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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 69-4

JOSEPH ARTHUR ZICARELLI, *Appellant,*

v.

NEW JERSEY STATE COMMISSION OF INVESTIGATION, *Appellee.*

On Appeal from the Supreme Court of the State of New Jersey

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICI CURIAE IN SUPPORT OF POSITION OF APPELLEE

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This brief is filed with the written consent of the parties, pursuant to Rule 42.2, Revised Rules of the Supreme Court of the United States. It supports the Appellee's position and the ruling below of the Su-

preme Court of New Jersey in *In Re Zicarelli,* 55 N.J. 249, 261 A. 2d 129 (1970), on the central issue of the required scope of witness immunity. That position is that "use restriction" immunity, as distinguished from "absolute" or "transactional" immunity, is a constitutional means to compel testimony after a claim of the privilege against compulsory self-incrimination.

INTEREST OF AMICI CURIAE

A. The National District Attorneys Association is a nonprofit, nonpolitical, tax-exempt corporation composed of approximately 4,000 members representing all 50 States. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. We seek to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

Crime in America has grown to include an extremely mobile and scientifically-equipped organization. To meet the coordinated power of this insidious segment of our society, which seeks by unlawful means to exploit its fellow citizen, the prosecutors of America must avail themselves of every available law enforcement technique, including the immunity statute technique, and utilize the advantages of cooperation and coordination open to them.

Over the past five years, this Association has sought and received this Court's permission to file Amicus Curiae briefs in criminal cases, with pervasive national significance.

The present issue is equally important—the "immunity bath" of absolute immunity versus the exclusionary rule of use restriction. This issue poses a conflict between two important legal principles—the fair trial right of compulsory process for both parties, and the privilege against compulsory self-incrimination. We feel that a rule requiring full use restriction, and only such a rule, will protect both of these legal principles.

The benefit to law enforcement—state, federal, and local—which would accrue from use immunity is of major importance. The criminal of today, especially the organized crime violator, is often engaged in many forms of undercover illicit activity, based on a web of interlocking agreements. Because there is little "hard" evidence, interrogation techniques are essential. If the plea of self-incrimination can only be countered with an absolute immunity statute, a gratuity to crime will accompany each immunity grant. All prosecutions in any jurisdiction which are related to the testimony will be barred, even if independent, untainted evidence exists. Governments may well hesitate to pay this high price for yet-to-be-acquired evidence of uncertain value, thus effectively blocking many important, even vital, investigations. Full use restriction immunity gives full protection to the witness without raising the hazards of an immunity bath. The familiar exclusionary rule should be the standard, not the concept of absolute immunity.

It is this interest, we respectfully submit, which compels us to seek the Court's indulgence in filing the instant brief.

B. Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit, nonpartisan, nonpolitical organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its bylaws the purposes of AELE are: (1) To explore and consider the needs and requirements for the effective enforcement of the criminal law; (2) To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens; (3) To assist the police, the prosecution and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE has appeared in this Court as Amicus Curiae in the cases of *Terry* v. *Ohio,* 392 U.S. 1 (1968); *Hill* v. *California,* 91 S.Ct. 1106 (1971), and *United States* v. *Roosevelt Hudson Harris,* 39 U.S.L.W. 4835 (U.S. June 28, 1971).

The interest of AELE is in representing the concern of the average citizen with the problems of crime and with police effectiveness. We seek to articulate this concern to the Court in order that the rights of the law abiding citizens of this country to be reasonably free from criminal harm may receive due consideration.

The instant case is, we believe, one of vital significance to law enforcement and to the law abiding citizen. Its importance to the citizens of this country becomes

obvious when we consider the pervasive nature of the influence of organized crime on the daily lives of all of us—rich and poor, black and white. The problem has been eloquently phrased in the recent report of a federal crime commission:

> In many ways organized crime is the most sinister kind of crime in America. The men who control it have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hardworking businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society.[1]

Grants of immunity in criminal cases have been primarily aimed at undermining the structure of organized crime, or of business crime (e.g., antitrust). The use restriction of immunized testimony, contended for herein, will make an immunity grant one of the most potent weapons available to the government against group crime. It will permit the maximum effective use of the immunity concept without creating an "immunity bath," and also will fully protect the witness against self-incriminating use of his disclosure.

For these reasons AELE respectfully submits that it has a valid interest in the instant case.

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[1] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 209 (1967).

QUESTION PRESENTED

Although the parties present several issues, the amici curiae address themselves only to the following constitutional question which is basic to the instant case and to others:[2]

> Consistent with the Fifth and Fourteenth Amendments, can a witness' claim of the privilege against compulsory self-incrimination be overcome by an immunity statute which bars use of the compelled testimony and any derivative fruits, but does not grant absolute immunity against prosecution for all offenses related to the compelled testimony?

SUMMARY OF ARGUMENT

Since 1896 it has been an established principle of American constitutional law that a witness' claim of the privilege against compulsory self-incrimination may be overcome by an immunity statute, and testimony may be compelled, because the Fifth Amendment is concerned only with self-incrimination, not self-infamy. *Brown* v. *Walker*, 161 U.S. 591 (1896). The only matter in dispute is the scope of the immunity which must be offered in order to remove the element of incrimination and thus provide a constitutionally adequate substitute for the right of silence which otherwise attends a proper claim of the Fifth Amendment.

As a matter of logic, and actual practice in the English speaking world, it is possible to distinguish three types of immunity: (1) prohibition of direct use of the testimony (limited use immunity); (2) prohibition

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[2] See, *e.g.*, *Stewart* v. *United States*, *Kastigar* v. *United States*, 440 F. 2d 954 (9th Cir. 1971), cert. granted, 39 U.S.L.W. 3511 (May 17, 1971).

of direct use of the testimony and any derivative fruits (full use immunity); (3) prohibition of prosecution for any transaction related to the compelled testimony (absolute or "transactional" immunity).

The first type, limited use immunity, was quite common in federal and state practice in this country during most of the nineteenth century, and is still the primary reliance in Canada and in England. However, as it came to be perceived that the compelled witness could still suffer a species of self-incrimination by furnishing clues to non-immunized evidence, doubts arose concerning the constitutional adequacy of such a statute. A federal limited use restriction statute, R.S. 860, was nullified in *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892), on the ground that it was not an adequate substitute for the Fifth Amendment.

The Counselman opinion did not discuss the constitutionality of a statute of the second type, full use restriction immunity, the issue not being present in the case. But it may be inferred from the Court's extensive discussion of federal and state precedents that such a statute would be constitutional. The present appeal brings to the Court for the first time the constitutionality of full use restriction immunity. The *Counselman* opinion did note that a statute of the third type, absolute immunity, would of course be constitutional. However, that statement is at best dictum if read as an exclusive requirement, and is better read as a rhetorical statement in keeping with the imprecision both about the Fifth Amendment privilege and about immunity statutes found in all courts in this period.

Faced, however, with this ambiguity in the *Counselman* opinion, Congress chose to play it safe, and its next immunity enactment—in support of investigations under the Interstate Commerce Act—took the form of an absolute immunity statute. It was sustained in *Brown* v. *Walker, supra,* and became the model for immunity legislation, federal and state, for 75 years. More realistic perceptions developed in the decade of the 1960's, however, in response to several opinions of this Court beginning with *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), and legislatures began to adopt the middle position of full use restriction immunity, *e.g.,* the New Jersey statute at issue in the instant appeal, and the new federal witness immunity act of 1970, 18 U.S.C. §§ 6001-6005 (1970).

An absolute immunity statute is an "immunity bath" statute. It grants blanket amnesty, or pardon, for any offense related to the witness' testimony. If the offense is "related" to the testimony, prosecution is barred even if the government has sufficient independent, untainted evidence to obtain a conviction. The concept offends not only logic but history. A careful study of the sources reveals that there is nothing in the English origins, early history, constitutional adoption, or nineteenth century perceptions of the privilege against compulsory self-incrimination which supports the proposition that a witness immunity statute can serve the purposes of the privilege only by operating as a total pardon for any offense related to the compelled testimony.

The essential purpose of the Fifth Amendment today is to ensure that an offender shall not be forced to help convict himself. The problem of religious and

political dissent with which the privilege was associated in its seventeenth century origins is now covered by the First Amendment, and a whole cluster of clauses in the Bill of Rights safeguard the core of the "accusatorial" method of law enforcement, as distinct from the inquisatorial method.

The absolute immunity concept, by exacting too high a price from the government and offering in effect a gratuity to crime, discourages governmental use of the immunity device as a law enforcement tool. This effect was not critical so long as the crime problem centered on individual crime. Today however, with the substantial increase in regulatory offenses and group crime, including white collar offenses such as consumer fraud and the pestilence of "organized crime," this effect is most detrimental to law enforcement and the protection of the public. In group crime there is little hard evidence, only a web of illegal understandings, and interrogation is essential as a law enforcement tactic.

In all other areas of evidence-related constitutional principles, our reliance is on the exclusionary rule, which is the analog of full use restriction in immunity statutes. For example, *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and a long line of search and seizure and electronic eavesdropping cases rest on the exclusionary rule, not on a blanket pardon concept. It would be anomalous to try to maintain the position that the exclusionary rule is good enough for safeguarding against harm flowing from police violations of constitutional principles in investigations of street crime and the offenses especially related to the poor, but also to argue that the crime of the middle classes—white

collar business crime, and organized crime—require blanket pardon before the immunity technique can be invoked.

A full use restriction concept can be placed under as heavy a governmental burden of proof of the "independence" of evidence used after an immunity grant as the Court deems needful to preserve the constitutional privilge—even more stringent than obtains in search and seizure situations. *Miranda* v. *Arizona, supra,* itself rests on something akin to a burden of proof concept related to Fifth Amendment interests. Full use restriction statutes also avoid the problem associated with absolute immunity statutes of proving the relationship of the testimony to the future prosecution, with the burden allocated to the defendant. Further, full use restriction better preserves equal treatment values among offenders than does an absolute immunity statute because the one immunized obtains a complete pardon, while the other may go to jail.

Although much has been made of the supposedly greater difficulty, inside a given law enforcement jurisdiction, of policing full use restriction immunity than of policing absolute immunity, no empirical proof has been advanced. Our traditional exclusionary rules for confessions and search and seizure have operated as effectively in intrajurisdictional context as in interjurisdictional context.

Looking to the future, a full use restriction immunity formula could be an appropriate way to extend the immunity technique on behalf of defendants, thus implementing their Sixth Amendment right to compulsory process even in regard to Fifth-Amendment-pleading defense witnesses. By contrast, it would be un-

thinkable to empower defense counsel to confer absolute immunity in such situations.

In short, a full use restriction immunity formula is constitutionally adequate to compel testimony under the Fifth Amendment, is in accord with traditional exclusionary rules, and avoids the immunity bath problem and other problems associated with the atypical concept of absolute immunity.

ARGUMENT

I. NOTHING IN THE ORIGIN, EARLY HISTORY, AND PURPOSES OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION, NOW EMBODIED IN THE FIFTH AMENDMENT AND MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT, SUPPORTS THE PROPOSITION THAT A WITNESS IMMUNITY STATUTE CAN SERVE THE PURPOSES OF THE PRIVILEGE ONLY BY OPERATING AS A TOTAL PARDON FOR ANY OFFENSE CONNECTED IN ANY WAY WITH THE COMPELLED TESTIMONY.

A. Seventeenth Century English Origins

The privilege against compulsory self-incrimination is at once the most romanticized and also the most complex and misunderstood of the guarantees embedded in the Bill of Rights. Its recognition in English jurisprudence is generally traced to the seventeenth century, a time of major political and religious upheaval during which both the Stuart monarchy and the regime of Oliver Cromwell resorted to extraordinary tribunals to repress dissent and bolster the realm. The trigger for the development of the privilege was opposition to the "oath ex officio." The oath had its origin in the ecclesiastical courts and was commonly used by special tribunals such as High Commission and Star Chamber, but not by the common law courts. The oath procedure was often the basis for a "fishing expedition" conducted without prior charge, or extending into matters

unrelated to such charges as were made. For refusal to take an oath and make responsive answers the witness could be subjected to physical compulsion.[3]

Lurking in the background of virtually all of the cases in this formative period was the factor of religious or political persecution—an attempt to use the power of judicial process to coerce orthodoxy in faith or politics. The cases were one facet of the seventeenth century struggle to contain the monarchy and subordinate it to the instruments of popular government. It is striking that the landmark cases in the development of the privilege did not involve the compulsory disclosure of crime in the usual common law categories of offenses against persons, property, or the public peace.

Decades, indeed centuries, of development came to a head in the career of John Lilburne, a Puritan and subsequently a leader of the Leveller party which under the Commonwealth sought extension of popular democracy, a written constitution, and an abolition of preferments based on property. The experiences and

[3] These two paragraphs are perforce a brutal condensation of a long sequence of developments, many details of which remain obscure despite the extensive historical scholarship which the privilege has attracted. See Lévy, *Origins of the Fifth Amendment* (1968); Mayers, *Shall We Amend the Fifth Amendment* (1959); 8 Wigmore, *Evidence* §§ 2250-2284 (McNaughton rev. 1961). Levy is best for the early period. His work is flawed however by a lack of legal knowledge and a cutoff date shortly after 1790 before the privilege really had become very clear either in England or America. He faults Mayers and Wigmore for inaccuracy on some historical details but he himself is weak on the relation of the privilege to the totality of constitutional guarantees in the investigatory process. Mayers' book is excellent for overview on the Fifth Amendment; and perusal of Wigmore's treatise is a must whether or not one agrees with all of the conclusions.

trials of "Freeborn John," whom Professor Levy has called the "most remarkable person connected with the history of the origins of the right against self-incrimination,"[4] lend valuable perspective to an understanding of the origin and original purposes of the privilege. His first offense was importing seditious Puritan books into England from Holland, sworn to in an affidavit by two confederates in 1637. Lilburne's denial of the accusation was probably a lie according to Levy,[5] but the crucial point was that Lilburne refused to honor the Court of Star Chamber procedure and to deny the accusation under oath, or to respond to interrogatories under oath. For this contempt he was sentenced to fines and imprisonment, and was whipped through the streets on the way to the pillory. Still defiant in the pillory he harangued the assembled crowd (until gagged) and threw them copies of the forbidden books.

In the ensuing years his pen and further persecutions brought him fame and an eventual collision with Oliver Cromwell, resulting in two more trials for his life—again before special tribunals but with use of a jury. In these trials the only "legal" issue was his authorship of certain tracts (1649 trial), and his identity as the person named in the bill of attainder (1653 trial). Although the oath process was not used, Lilburne was pressed to plead to the indictment, to respond to questions, to say whether certain handwriting was his, to say who he was. To all of this he responded with a barrage of words, and technical objections, and harangues—all non-responsive because,

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[4] Levy, *supra* 271.

[5] *Id.* at 273.

he said, the Petition of Right taught him to answer no questions "against or concerning" himself.[6] His basic strategy was to appeal to the jury, over the heads of the judges, and to do this he had to give them some technical basis—by his refusal to give responsive answers—for doubting authorship or identity.

In both trials he succeeded, even though in the last trial Cromwell virtually had London under martial law. The last acquittal, however, had no impact on government policy. Cromwell had Lilburne moved from Newgate prison to the Tower—"for the peace of the nation";[7] thence to exile on the island of Jersey; and finally back to Dover. After his death in 1657 Parliament revoked his illegal sentence.

More than "any other individual," says Levy,[8] Lilburne was responsible for the acceptance of the principle against compulsory self-incrimination. And his career is equally instructive on the "original meaning" and function of the privilege against compulsory self-incrimination. In the context of the time it was the sole available *means* to certain vital libertarian *ends* which we now achieve equally effectively, or more effectively, by other devices. In part it was a *jurisdictional plea.* In the regular criminal courts at this time interrogation of the accused did occur, but there was no means for compelling an answer.[9] Indeed, the common law courts from the outset prided themselves on avoidance of torture.[10] Lilburne and others were

[6] *Id.* at 307.

[7] *Id.* at 312.

[8] *Id.* at 313.

[9] Mayers, *supra* note 3 at 6.

[10] Levy, *supra* note 3 at 33.

tried primarily before special tribunals who did not respect this policy. From this perspective the plea against self-incrimination was a jurisdictional plea, seeking to have special tribunals conform their practice to conventional practice—analogous to modern pleas to remove certain cases from court-martial jurisdiction.

Even more significantly, the self-incrimination plea was an alternative to the as yet unborn right of *freedom of speech and press,* including freedom of vitriolic pamphleteering against the current government. Free speech not being a right, Lilburne's tactic was to use the plea against self-incrimination as a way of preventing the government from proving authorship (though he was the author as all knew). And the jury in the last two trials was rendering really a free speech-political dissent verdict. So at the outset the origin of the "Fifth" was anomalous if not confused—it was not used effectively to block torture, but as a roundabout way, in trial strategy, of vindicating an unborn right of free speech, even under a dictatorial Great Protector.

As Levy perceptively observes in his conclusion to his analysis of the "securing" of the privilege in seventeenth century England, it was *not* linked to *crimes* but to freedom of speech and religion. At issue was not investigation of common law crimes, or business crimes, or the rackets of organized crime, or routine maintainance of public order, or even politically-motivated killings, bombings or destruction of property. At issue was peaceful, if vitriolic, political and religious dissent. As he puts it:

> Above all, the right was most closely linked to freedom of religion and speech. It was, in its

> origins, unquestionably the invention of those who were guilty of religious crimes, like heresy, schism, and nonconformity, and, later, of political crimes like treason, seditious libel, and breach of parliamentary privilege—more often than not, the offense was merely criticism of the government, its policies, or its officers. The right was associated then with guilt for crimes of conscience, of belief, and of association. In the broadest sense it was a protection not of the guilty, or of the innocent, but of freedom of expression, of political liberty, of the right to worship as one pleased.[11]

At the risk of anticipating somewhat the argument yet to come in this brief, it may be observed at this point that a perception of the historical background is doubly instructive. The preeminently precious rights —now called First Amendment rights—to secure which a self-incrimination privilege was asserted by "Freeborn John" Lilburne as a procedural ploy, are themselves even today not viewed as absolutes. It is still as true as it was in 1919 that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck* v. *United States,* 249 U.S. 47 (1919). How anomalous it would be then, in the light of history, to insist that an immunity statute designed to offer an equivalence for the privilege against self-incrimination must go beyond immunizing the testimony and its fruits, and offer an absolute immunity from any prosecution related to the testimony. Even the Fifth Amendment itself does not operate as a pardon. Defendants who refuse to take the stand are convicted on other evidence with regularity.

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[11] *Id.* at 332.

B. Reception of the Privilege in America

Once we leave the time of John Lilburne we enter into a sea of confusion concerning the breadth of the privilege against self-incrimination as received into the common law, the extent to which it was later embedded in constitutional law, the gradual changes both broadening and contracting the perceived scope of the privilege, the timing of these changes, and the different developments in England and America. The questioning of the accused at his trial gradually ceased and was replaced with a right of the accused not to take the stand —not, however, because of self-incrimination but because of the common law rule that self-interest made parties incompetent as witnesses.[12] Subsequently, the right not to have adverse comment made on his failure to take the stand was added. More importantly for our purposes, what had begun only as a protection for the accused was gradually extended to an ordinary witness, albeit the record is confused and dates are much in dispute.[13]

Particularly significant is the fact that the privilege against compulsory self-incrimination, especially with regard to witnesses, was sufficiently unclear in American practice at the time of the constitutional convention that the Fifth Amendment language does not in terms apply to witnesses (or even to parties) in all situations. The language of the Fifth Amendment is narrower than the apparent common law practice at the time in some states, and far narrower than our cur-

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[12] Mayers, *supra* note 3 at 17.

[13] *Id.* at 290-91. See also Levy, *supra* note 3, at 368, 402-04, who, however, does not always keep in mind the distinction between the accused and the witness in regard to the privilege.

rent constitutional interpretation of the scope of the privilege. The amendment provides only that "No person . . . shall be compelled in any criminal case to be a witness against himself."

Reacting not merely to these words but also to legislative history, Mayers has constructed a very plausible argument for the proposition that the Fifth Amendment was not intended to apply to witnesses in any proceeding, thus making it a protection only for the criminal defendant himself. He reaches this conclusion by an analysis of the narrow language of the contemporaneous (and some subsequent) state constitutions which focussed only on the accused, the similar focus of early drafts of the Fifth Amendment preceding Madison's draft, and the insertion of the phrase "criminal case" by Congress in the Madison draft.[14] Although objecting to Mayers' interpretation, Levy never really comes to grips with the full sweep of Mayers' analysis. He does concede that the question whether the "framers of the Fifth Amendment intended it to be fully coextensive with the common law cannot be proved—or disproved."[15] It also may be noted that Chief Justice Marshall did not refer to the constitutional clause when he sustained the right of a witness not to answer an incriminating question in Burr's trial. *In re Willie (United States* v. *Burr),* 25 Fed. Cas. 38 (C.C.Va. 1807).

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[14] Mayers, "The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common-Law?," 4 *J. of Leg. Hist.* 107, 108-19 (1960). Mayers also surveyed early nineteenth century treatises on the law of evidence and found that what we now call the privilege against compulsory self-incrimination was ignored or received casual mention. Mayers, *supra* note 3, at 315-16.

[15] Levy, *supra* note 3, at 429-30.

It is not our intention to re-fight the battle of historical interpretation. Whatever its original meaning, it has been clear since *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), that the Fifth Amendment privilege may be invoked by a witness as well as by the accused, and the privilege has been extended beyond the "criminal case" to all official proceedings in which self-incrimination arises. What this historical analysis *does* suggest is that we are dealing with a value which was quite murky in its inception. Once divorced from the freedom of speech interest with which the rise of the privilege was associated in the seventeenth century, the privilege was *not* perceived as being of the highest priority for protection as a constitutional absolute in all circumstances. Hence this history argues against the view that the self-incrimination privilege is so preeminent and unique that it can be replaced only by the extraordinary device of absolute immunity, rather than by the conventional use-restriction or exclusionary immunity which adequately safeguards other important constitutional interests concerning coerced confessions or search and seizure violations.

II. PRE-COUNSELMAN V. HITCHCOCK CASES CONSTRUING STATUTES OR IMMUNITY GRANTS SUGGEST THAT ABSOLUTE IMMUNITY IS NOT REQUIRED.

A. Pre-Nineteenth Century Examples

The very occasional early instances of giving "indemnity" to overcome self-incrimination in England or the colonies present a mixed and uncertain picture and have little relevance to the present day. Some indemnities, as they were called, seemed to be of a limited "use-restriction" nature, others may have been broader. There are examples of ad hoc indemnities created for particular witnesses who were obvious law breakers;

these indemnities operated in the nature of a pardon, which is of course a broad act of grace not necessarily related to the self-incrimination issue.[16]

The scope of indemnity was seldom clear by modern standards, which distinguish *three* types of immunity: (1) prohibition of direct use of the testimony in future prosecution (limited use immunity); (2) prohibition of direct use of the testimony and any fruits derived therefrom (full use immunity);[17] (3) prohibition of prosecution for any transaction related to the compelled testimony (absolute or "transactional" immunity). For example, in New York in 1772 a use restriction immunity provision in lottery legislation immunized offenses only under that specific act; and in a Pennsylvania legislative inquiry into seditious speech in 1758 immunity was offered, again apparently only in the context of the particular offense under inquiry.[18] See also the following early English cases which either support the foregoing comments or are simply ambiguous on these issues. *Lord Chancellor Macclesfield's Trial,* 16 State Trials 767, 921, 1147 (1725); *Bishop Atterbury's Trial,* 16 State Trials 323, 604 (1723) (ad hoc immunity grant); 1742 investigation of Robert Walpole, broad ad hoc statute but apparently not absolute in the sense of barring all related prosecutions even if based on independent testimony, 8 Wigmore,

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[16] See, *e.g.*, the 1760 use of pardons in the interrogation of New York ship captains in a trading with the enemy investigation, Levy, *supra* note 3, at 389.

[17] "Testimonial" immunity is an awkward term sometimes used at this point, but it fails to distinguish the limited, direct use immunity statutes from those fully safeguarding against both direct and derivative use.

[18] Levy, *supra* note 3, at 403 (N.Y.) and 385 (Pa.).

Evidence § 2281 n.3 (McNaughton rev. 1961); *Rex* v. *Warickshall*, 1 Leach's Crown Cases 263, 264 (1783) (allowing even use of fruits of the poisonous tree in extorted confession case).

There is no indication that any of these early legislators were even thinking of the three varieties of immunity noted above. It is apparent that they viewed the danger primarily in terms of direct use of incriminating testimony, and the actual wording of the immunity statute was happenstantial. However, in the context of most of the inquiries of that day, no derivative use was likely anyway, so that even a limited direct-use immunity provision gave adequate protection.

It is significant that once immunity statutes began to develop in the context of modern governmental law enforcement needs, to which we now turn, the developed practice in England and Canada was to employ a use restriction rather than the absolute immunity concept. And the same was true in many of the American states whose experience with immunity statutes antedated the federal experience and was discussed in *Counselman* v. *Hitchcock*, *supra*.

B. Nineteenth Century American Practice

When we turn to the American practice in the nineteenth century we again find little support for an absolute immunity concept. The dominant theme that emerges is intellectual confusion between the common law privilege and the constitutional language, and uncertainty concerning both. The next theme that emerges is that use restriction rather than absolute exoneration was deemed adequate to satisfy the privilege —insofar as the issue was raised at all because im-

munity statutes were rare. A third theme finding some support is that immunization of the privileged testimony alone would be adequate to satisfy the privilege, without need to immunize the "fruits."

The idea that the privilege included self-infamy, which had never been clearly established, also faded away. There had been intermittent intimations going all the way back to the 1500's that the law of evidence frowned not only on self-incrimination, but also on self-infamation—infamy or disgrace even though not incriminating. The suggestion, however, that the Fifth Amendment as drafted was intended to encompass self-infamy as well as self-incrimination has been labelled a "baseless concoction," [19] and *Brown* v. *Walker,* 161 U.S. 591 (1896), expressly repudiates the self-infamy claim. A rejection of the self-infamy concept is a precondition, of course, of the validity of *any* immunity statute, whether of the absolute type, or the full use restriction type. Only complete silence can guard against self-infamy—if then.

The dominant approach in the state courts throughout the nineteenth century was that use restriction immunity, even of the sort that only barred direct use of the testimony and did not bar derivative use, was adequate to overcome a plea of the privilege against compulsory self-incrimination. Nine states upheld immunity statutes of this narrow sort: (Arkansas, California, Georgia, Indiana, Iowa, Missouri, New York, North Carolina, Vermont), and only three states rejected them: (Massachusetts, New Hampshire, Virginia). 8 Wigmore, *Evidence,* Sec. 2283 n.2 (Mc-

[19] Levy, *supra* note 3, at 515. For background on self-infamy see also 317-18, 515-16.

Naughton rev. 1967).[20] The New York court, under a constitutional clause which protected a person against being a "witness" against himself, was particularly forthright in rejecting the argument that indirect use as well as direct use of testimony must be barred, saying that "neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes." *People* v. *Kelly,* 24 N.Y. 74, 83 (1861).

The minority of states taking the contrary position did not themselves forthrightly embrace the other extreme—absolute immunity—but stressed the need to safeguard against the dangers of derivative use.[21] Their basic position was to insist only on full use restriction immunity, covering both direct and derivative use of the testimony. Their occasional use of broader "absolute immunity" language is mere loose usage.

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[20] Anyone who peruses these early cases should be forewarned that he will encounter obtuseness and loose language, so that a proper classification of a given state's position requires a contextual analysis and careful judgment in selecting quotable language. For example, in *State* v. *Quarles,* 13 Ark. 307, 310-11 (1853), the court explicitly approved a limited use restriction concept, and prosecution even after immunity, provided the evidence be independent. It then talked about the need to safeguard also against peripheral dangers. On close reading this turns out to be a concern not about derivative use of immunized testimony (use and fruits), but only a concern about direct disclosures by the witness of crimes not the subject of the immediate inquiry.

[21] Tennessee may be an exception. A statute which appeared to offer absolute immunity (although it is unclear whether it would bar prosecution on independent evidence, which is an element of the absolute immunity concept) was upheld as sufficient to replace the privilege, as of course it should have been. *Hirsch* v. *State,* 8 Baxt. 89, 91 (Tenn. 1874). The dissenters in this case prevailed in a subsequent case, apparently on the ground that no immunity statute could overcome the privilege—a view not followed in federal practice under the Fifth Amendment.

The facts of the cases did not put in question the efficacy of full use restriction immunity itself, and the courts themselves did not postulate that intermediate position between limited use immunity and absolute immunity.

For example, in *Commonwealth* v. *Emery,* 107 Mass. 171 (1871), the court construed the state constitution as protecting against derivative use and not merely direct use, and voided a limited, direct use statute which only provided that one's "testimony" shall "not be used as evidence" against him. In doing so the court stressed that the Massachusetts constitution, unlike New York's, safeguarded not only against self-accusation but also against compulsion to "furnish evidence against himself." The court then went on to say twice that the immunity must be coextensive with the protection which "he would be secured" under the plea of privilege (exchange theory but not a pardon theory). It then added in semantically confused fashion the following: "Under the interpretation already given this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate." *Id.* at 185. Taken out of context this might sound like absolute immunity, even barring prosecution under independent evidence for an offense to which his "testimony shall relate." Taken in context, however, and surrounded by two sentences stressing the exchange theory, the court was only expressing in rounded but careless rhetoric the *full* use restriction theory. See further discussion of *Emery, infra,* in the critique of the *Counselman* opinion.

The New Hampshire court, after initially following New York in approving limited use immunity, switched

and followed Massachusetts. *State* v. *Nowell*, 58 N.H. 314 (1878). The two states' constitutional clauses were the same, and the New Hampshire court opened its opinion by construing its constitution as safeguarding against direct use and fruits (admissions as "sources" of incriminating evidence), thus setting up the same exchange theory which is more clearly articulated in *Commonwealth* v. *Emery*. In clarifying the essentials of a valid immunity statute the court said the act must relieve one of liabilities "on account of" the matter disclosed, again suggesting a needed causal connection between the disclosures and the subsequent immunized prosecution. Turning to the statute it found two clauses, a use restriction clause and an absolute immunity clause. The former, although phrased as barring use of one's testimony "as *evidence*, directly or indirectly" against him, arguably would not reach all derivative use; rightly or wrongly the court seems to have so treated it. For in saying that the statute would be invalid if it contained only the first clause, the court relied squarely on *Emery*, and it is clear that the Massachusetts statute in *Emery* was only a limited use statute. The court also quoted the loose rhetoric of *Emery* already discussed above. Thus, even though the second clause in the New Hampshire act was an absolute immunity clause, the court's opinion can be read as rejecting limited, direct use immunity and approving absolute immunity as adequate, without going so far as to endorse absolute immunity as a constitutional requirement. It passed up an apparent opportunity to discuss the efficacy of a full use immunity provision.

The Virginia court, under a similar state constitutional clause protecting against giving "evidence

against himself," likewise rejected a limited use restriction statute. *Cullen* v. *Commonwealth,* 24 Gratt. 624, 633 (1873). It pointed to the danger of derivative use, whereby the government would be led by the immunized testimony to other "means and sources of information" of incriminating nature. Hence, again the court's additional reference to the need for an "absolute wiping out of the offence as to him" must be placed in context. This would give protection, but the alternative of full use immunity was not considered. Also, in the quoted phrase, a wiping out of *"the* offense"—aid by a surgeon in a dueling matter in this instance—might not safeguard against other offenses disclosed such as practicing medicine without a license. Such a "complete amnesty," related *only* to the offense under inquiry, would be more narrow than full use restriction immunity.

On the basis of *Emery, Nowell* and *Cullen* it can be said that even under state constitutional clauses broader than the Fifth Amendment ("furnish evidence against himself" clause), absolute immunity was not clearly held to be mandated. And most courts in this long formative period were satisfied—wrongly in our belief—with limited, direct use immunity, thus allowing derivative use of the testimony extracted.

To the same effect are the federal cases under the same federal immunity statute, R.S. 860, which was at issue subsequently in *Counselman* v. *Hitchcock. United States* v. *Brown,* 24 F. Cas. 1273 (No. 14,671) (D. Ore. 1871); *United States* v. *McCarthy,* 18 F. 87, 89 (C.C.S.D.N.Y. 1883); *United States* v. *Williams,* 28 F. Cas. 670 (No. 16717) (C.C.S.D. Ohio 1872); *In re Strouse,* 23 F. Cas. 261 (No. 13,548) (D. Nev. 1871);

In re Phillips, 19 F. Cas. 506 (No. 11,097) (D. Va. 1869).. Indeed, the federal court in the *McCarthy* case in 1883 cited and quoted from *People* v. *Kelly, supra,* in which the New York court had explicitly said that a statute which immunized only the actual testimony, and not the fruits of the tree, was constitutional. The court, however, did not explicitly rule on this point (derivative use not being in issue in the cases), nor did the court discuss whether the federal statute should be read as a limited use immunity statute, or a full derivative use imunity statute. Arguably, the federal statute (quoted in text, *infra*) could be construed either way, because it contained the additional phrase "in any manner used against him."

III. COUNSELMAN HOLDS THAT A LIMITED USE RESTRICTION STATUTE, IMMUNIZING ONLY DIRECT USE OF THE ACTUAL TESTIMONY, IS INADEQUATE TO SUPPLANT A CLAIM OF THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION BECAUSE IT DOES NOT BAR USE OF THE DERIVATIVE "FRUITS" OF THE TESTIMONY; NO FULL USE RESTRICTION IMMUNITY STATUTE WAS BEFORE THE COURT ALTHOUGH THE MAIN BODY OF THE COURT'S OPINION INDICATES THAT SUCH A STATUTE WOULD BE CONSTITUTIONAL; THE COURT'S CONCLUDING LINES ABOUT THE CONSTITUTIONALITY OF AN ABSOLUTE IMMUNITY STATUTE IS AT BEST A DICTUM IF READ AS AN EXCLUSIVE REQUIREMENT.

A. Nature of the Statute under Litigation

We thus come down to the landmark case of *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892), with a strong state and federal court commitment toward a limited use restriction immunity concept, and little or no support for an absolute immunity concept. There also had been a fair amount of conceptual confusion in the opinions of these pre-*Counselman* courts, if not in the holdings, because of a failure to perceive that there are

three potential kinds of immunity, not two: (1) *limited* use immunity, which bars only direct use of the actual testimony; (2) *full* use immunity, which also bars derivative use through leads to other evidence (and which thus is even broader than an amnesty confined to a particular offense); (3) *absolute* immunity, meaning full amnesty for any offense to which any testimony relates, *i.e.*, "immunity bath." Not to put too fine a point on it, the *Counselman* court shared this confusion, thus contributing to continued conceptual difficulties in the immunity statute field.[22]

The *Counselman* litigation involved an immunity statute derived from a measure passed in 1868 for the more effective administration of justice. 15 Stat. 37; and see comment of Congressman Williams, Pennsylvania, *Cong. Globe,* 40th Cong., 2d Sess. 1334 (1868). A bit of background on the experience with early federal immunity legislation is needed to put this 1868 law in perspective.

The first federal immunity statute of any kind was passed in 1857 in support of the congressional investigatory power. This law was triggered by witness recalcitrance in a congressional investigation of alleged payoffs to members for legislative favors. In its zeal to give investigating committees effective power to compel testimony, Congress enacted a broad immunity provision which could be, and soon was, abused. Phrased as an absolute immunity statute, it extended

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[22] For a history of federal immunity legislation and litigation to 1954 see Dixon, "The Fifth Amendment and Federal Immunity Statutes," 22 *Geo. Wash. L. Rev.* 447 and 554 (1954). See also Wendel, "Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion," 10 *St. Louis U. L. J.* 327 (1966); Note, 72 *Yale L. J.* 1568 (1963).

immunity "... for any fact or act touching which he shall be required to testify." 11 Stat. 155 (1857). Embezzlers of Indian trust bonds from the Department of Interior quickly obtained immunity from prosecution. Congressman Wilson of Iowa said that "every day persons are offering to testify before the investigating committees of the House in order to bring themselves within the pardoning power of the act of 1857." *Cong. Globe,* 34th Cong., 2d Sess. 364 (1862).

Reacting against this "immunity bath" problem Congress went from an absolute immunity concept to the other extreme—a limited use immunity concept. It enacted a replacement congressional immunity statute in 1862 providing that the "testimony" of a witness "shall not be used as evidence" against him in any criminal proceeding. 12 Stat. 333 (1862). That the Congress was aware that under this statute the immunized testimony could still be used to ferret out other evidence is indicated by this comment of Senator Wade of Ohio: "That is all that a rascal ought to have at the hands of justice, even more than he ought to have." *Cong. Globe,* 37th Cong., 2d Sess. 429 (1862). What is not clear is whether Congress, in thus overreacting to the immunity bath problem, was aware of or intelligently considered the intermediate position. That position, of course, would be to enact a full use immunity statute (testimony and fruits), which would have minimized the perceived danger of immunity baths, with which they had recent experience, without leaving the witness in an exposed position as does the limited use provision.

It was against this background, and also the background of the above-discussed trend in state courts to approve limited use restriction immunity, that Congress

in 1868 enacted the first general immunity statute applicable to parties and witnesses in court and grand jury proceedings. 15 Stat. 37 (1868). In keeping with the congressional determination to avoid further immunity baths, the 1868 law, like the 1862 replacement congressional immunity statute, was phrased to immunize the actual testimony. As carried into the Revised Statutes, R.S. 860, and litigated in *Counselman* v. *Hitchcock* it reads as follows:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided,* That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

It may be noted that in one respect the language of the 1868 law was different from the 1862 law, because of the explicit prohibition against using the compelled testimony "in any manner" against the witness. This language could have been a basis for arguing that Congress intended full use immunity, *i.e.,* prohibition of derivative use of testimony, and not mere limited use immunity.

B. Litigation and Briefs in Counselman

Counselman v. *Hitchcock* marked a major turning point—and in part a wrong turn—in the development of immunity statute practice and theory. The case arose when a grain shipper refused to answer questions before a federal grand jury investigating railroad

rates and alleged rebates, despite the government's invocation of the 1868 immunity statute (R.S. 860). The federal circuit court refused to release Counselman from custody under this compulsory testimony law, despite the argument that the limited immunity authorized would not bar use of compelled testimony as leads to other evidence. *In re Counselman,* 44 Fed. 268 (C.C.N.D.Ill. 1890). It thus continued the dominant trend of this era to approve limited immunity grants and not to worry about use of the "fruits" of such testimony. The opinion indicates that what really bothered this court about the "fruits" doctrine was that it would even bar the testimony of an eye witness to murder, if the government would not have known of the eye witness except by illegally extracting a confession from the accused or using his immunized testimony.

The Supreme Court on appeal in *Counselman* thus was confronted with an all or nothing situation, and had to reverse unless it was willing to support the limited immunity concept. In reversing and rejecting limited use immunity the Court reached a decision to which no one now seriously objects, and which can be viewed as a proper disposition of that case.

But what was to be the basic rationale of this decision: that the critical vice of R.S. 860 was that it did not embrace the full use of immunity concept (barring direct use and fruits), or that it did not go still further and embrace an absolute immunity concept? On this question the Court received little help from the short circuit opinion, and little from the briefs of the parties.

The brief of the appellant (defendant) in *Counselman* placed heavy reliance on the three state cases, discussed extensively *supra,* which had rejected limited

use immunity. But these cases—*Emery, Nowell,* and *Cullen* from Massachusetts, New Hampshire, Virginia respectively—were shown above to be classifiable as full use immunity cases which did not explicitly consider the distinction between full use immunity, and absolute immunity. In his brief the appellant waffled back and forth as to his real concern, saying variously that his position was: (1) that an immunity statute under which the fruits of testimony could be used was inadequate; (2) that only an absolute immunity statute could be constitutional; (3) that no immunity statute could be constitutional because the constitutional policy is that no self-incriminating testimony shall ever be brought into existence. Brief for Appellant (Carter's Brief), pp. 26, 32-33, 42, 57.

The briefs for the appellee (the United States) also were conceptually weak and many-faceted. One brief relied on the constitutional efficacy of limited use immunity, as consistently upheld by lower federal courts and a preponderance of the state courts, *e.g.,* the oft-quoted New York opinion in *People* v. *Kelly,* discussed *supra.* Brief for Appellee (Attorney General Miller and Lambertson), pp. 10-15, 27. It made an ambiguous reference to the admissibility of independent evidence principle in the law of confessions, which by analogy argues against the absolute immunity concept. *Id.* at p. 16. It also fallaciously conceded that the Massachusetts, New Hampshire and Virginia cases (*Emery, Nowell* and *Cullen* discussed *supra*) do require absolute immunity, and tried to explain them away by saying the state constitution texts were broader than the Fifth Amendment. *Id.* at p. 25. Actually these cases, as analyzed *supra,* in this brief, rest on the need for full use restriction.

Another brief for the appellee ambiguously referred to a trial right, under involuntary confession principles, to exclude evidence derived from immunized testimony (thus hinting at full use restriction but not tying it to the Fifth Amendment as a constitutional principle). Supplemental Brief for Appellee (Asst. Atty. Gen. Parker and Lambertson), p. 10. It also suggested that R.S. 860 could be construed as barring the use of the "fruits" as well as the testimony itself, if required in order to be coextensive with the Fifth Amendment. *Id.* at pp. 16-17. This critical point however was buried in a sea of words and was overshadowed by the pounding insistence that mere limited use restriction was enough. Tucked in as an afterthought was the equally important assertion that the framers of the Fifth Amendment had no thought of barring any conviction based on *independent* testimony. But the point was left ambiguous: *i.e.,* did "independent" mean untainted; or did it mean merely independent in the sense of being provided by a person other than the immunized witness even though it was the immunized testimony which led the government to that person.

In sum, the briefs in *Counselman* never clarified the true meaning of the earlier cases in Massachusetts, New Hampshire, Virginia. The Government's main thrust was the proposition that the Fifth did not reach fruits; hence a limited use immunity statute was all right. The Government never developed adequately the concept of truly independent testimony, and the consequent lack of need for an absolute immunity concept. Handled as an afterthought was the suggestion that R.S. 860 if need be could be read as a "use and fruits" statute, and this suggestion was not supported by a delineation of legislative history.

C. Counselman Opinion

Against this background it is not surprising that Justice Blatchford's opinion for the Court in *Counselman* v. *Hitchcock,* although clear on extending the Fifth Amendment to a witness as well as to a party, was far from clear on the nature of the privilege itself, or on the necessary scope of a constitutionally effective compulsory testimony act. In particular the full use immunity concept was not clearly distinguished from the absolute immunity concept.

Two things stand clearly in the *Counselman* opinion. The first is the Court's feeling—unlike the dominant trend in court decisions up to that time—that an immunity statute is insufficient to replace a plea of the Fifth Amendment if it immunizes only direct use of testimony, and not the fruits. The Court's forthright statement on this point is found at 142 U.S. 564, where the Court said that R.S. 860 would not prevent "the use of his testimony to search out other testimony," and hence was "not coextensive with the constitutional provision." The second is the Court's interpretation of R.S. 860 as only providing the former, insufficient, protection, and not the latter. The opinion could have stopped at this point, for the case was decided; but Justice Blatchford continued on.

The bulk of his opinion consists of a twenty-page review of past state and federal cases, including the 9 - 3 state court split on the sufficiency of limited use restriction immunity analyzed *supra* in this brief. He then summarized, and the first point was that the various constitutional provisions including the Fifth Amendment, despite slight differences in wording, ought to have the "same interpretation." And he said it would be a "reasonable construction" to follow the

full use restriction immunity theory of Massachusetts as laid down in *Emery's Case* which he quoted as follows:

> the witness is protected "from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him." 142 U.S. at 585.

Justice Blatchford closed his opinion with an additional three or four paragraphs, noting that some states had satisfactorily replaced the privilege with absolute immunity statutes. It is here that he added the comment which has been the cause of so much confusion ever since, saying:

> In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People* v. *Kelly,* in New York. 142 U.S. at 586.

Placed in context of the loose language of the times and the total opinion, this comment is understandable, and does *not* constitute a holding that even if R.S. 860 were broadened to encompass full use restriction immunity it would still be constitutionally insufficient. On the preceding page Justice Blatchford had already approved the full use restriction concept. Significantly, even in this last quoted comment he cited the doctrine of *Emery's Case* (*Commonwealth* v. *Emery, supra*) as the one he was following; but that doctrine—as already shown above—is a full use immunity doctrine, not an

absolute immunity doctrine. And the doctrine of *People* v. *Kelly,* which he was rejecting was a limited use immunity doctrine.

At best this last comment is a puzzling dictum, and has been so labeled.[23] Because the Court's primary concern throughout its opinion was to get rid of R.S. 860, on the ground that its limited use immunity formula was too narrow, this comment is best viewed as constitutional rhetoric, not really rising to the level of a considered dictum.

Whether rhetoric or dictum, Justice Blatchford's comment controlled the congressional reaction to the demise of R.S. 860. Congress decided to "play it safe"[24] and in its next enactment went all the way to absolute immunity language, and continued this practice in additional enactments until it switched to full use restriction in 1970. 18 U.S.C. §§ 6001-6005 (1970). By dominating our immunity statute *practice* for 75 years, the Blatchford comment also dominated our constitutional *thinking.*

The absolute immunity statute which Congress enacted a year after *Counselman* was designed to support enforcement of the Interstate Commerce Act in court or ICC proceedings (thus beginning the tradition of ad hoc statutes rather than a single general immunity statute). Sustained in *Brown* v. *Walker,* 161 U.S. 591

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[23] McKay, "Self-Incrimination and the New Privacy," 1967 *Supreme Court Review* 193, at 229; National Commission on Reform of Federal Criminal Laws, *Working Papers,* "Comment on Immunity Provisions" (Dixon), vol. 2, pp. 1405-44, at 1423 (1970).

[24] Comment of Judge Friendly in *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of the City of New York,* 426 F. 2d 619, 623 (2d Cir. 1970).

(1896), it was copied in many subsequent statutes, federal [25] and state. Its operative wording is:

> . . . no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise. . . . 27 Stat. 443 (1893).

IV. THE CONCLUSION THAT COUNSELMAN DOES NOT REQUIRE ABSOLUTE IMMUNITY IS SUPPORTED NOT ONLY BY HISTORY AND LOGIC, BUT ALSO BY BRITISH AND CANADIAN PRACTICE.

It is the contention of the amicus curiae that *Counselman* v. *Hitchcock,* despite Justice Blatchford's terminal peroration, should be interpreted as a constitutional requirement only for full use restriction immunity—thus leaving the question of absolute immunity to legislative-executive choice in the light of law enforcement needs. The correctness of this interpretation has already been shown to be dictated by the Blatchford opinion itself when taken as a whole, by the state precedents in states such as Massachusetts, New Hampshire, and Virginia on which Justice Blatchford was relying, by the logic of the Fifth Amendment itself, and by antecedent colonial and English history, insofar as these distant sources are relevant. The correctness of this interpretation is also supported by consistent Canadian practice, and also by British practice, of avoiding absolute immunity.

The English Parliament, like the American Congress until 1970, has preferred to handle immunity on an ad hoc basis resulting in several types of modification of the privilege with different statutory wordings, lead-

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[25] National Commission on Reform of Federal Criminal Laws, *Working Papers, supra,* vol. 2, pp. 1444-45 (1970).

ing one commentator a few years ago to observe that the "time has come for a rationalisation of all the relevant statutory provisions."[26] The common practice has been to bar only *direct* use of the testimony compelled (limited use immunity), and neither to bar use of the fruits of compelled testimony, nor to provide absolute immunity. For example, the Theft Act of 1968 provides that "no statement or admission" compelled under the Act shall "be admissible in evidence against that person or . . . against the wife or husband of that person." Theft Act of 1968, c. 60, § 31. Similar limited use immunity provisions are found in the acts touching on, *inter alia,* election frauds, Representation of the People Act, 12, 13 & 14 Geo. 5, c. 68 § 123 (1949), and the repealed Larceny Act of 1916, 6 & 7 Geo. 5, c. 50 § 43 (2) (3). The limited use immunity provision of the now repealed Bankruptcy Act of 1890, 53 & 54 Vict., c. 71, § 27(2), is of special interest because it was coupled with § 27(1), repealing so much of § 85 of the Larceny Act of 1861, 24 & 25 Vict., c. 96, as relieved witnesses compulsorily examined in bankruptcy proceedings of liability to prosecution for certain misdemeanors specified in the 1861 Act. Thus in the era of *Counselman,* with its expansionist absolute immunity dictum, the Parliament was getting rid of a statute which was somewhat broader in its wording than the English custom of limited use restriction. The Army Act and the Air Force Act likewise contain immunity provisions phrased as a limited use statute ("evidence given . . . shall not be admissible") which would fall far short of absolute immunity even if liberally construed to also bar the "fruits" of such admissions.

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[26] R. Cross, *Evidence* 233 (1958).

Army Act of 1955, 3 & 4 Eliz. 2, c. 18, § 135; Air Force Act of 1955, 3 & 4 Eliz. 2, c. 19, § 135.

The Canadian immunity statute practice, like the developed English practice, has been to reject the absolute immunity concept and to authorize use restriction through statutes which in terms offer only limited use restriction, not barring use of the fruits of the immunized testimony. There are a number of ad hoc statutes, both dominion and provincial, with slightly different wording. Wigmore reports that such statutes are enforced according to their terms, without regard to their "possible inefficiency in removing all risk of subsequent prosecution through clues obtained." See 8 Wigmore, *Evidence,* Sec. 2284, p. 525; Sec. 2282 at p. 508n. For example, the Canada Evidence Act enacted in 1892, the same year that *Counselman* v. *Hitchcock* was decided, reads as follows:

> No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him . . . [but] the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place. . . . Can. Rev. Stat. c. 307, § 5.

The courts have turned aside pleas to give the statute a full use restriction, rather than a limited use restriction effect, refusing to extend it to incriminating documents involuntarily produced, *R.* v. *Simpson,* [1943] 3 D.L.R. 355 (C.A.), or to "fruits" of the compelled testimony. *Re Ginsberg,* 38 D.L.R. 261, 264 (1917).

V. THE CONSTITUTIONALITY AND EFFICACY OF FULL USE RESTRICTION IMMUNITY UNDER THE FIFTH AMENDMENT IS SUPPORTED STRONGLY BY RECENT CASES OF THIS COURT; AND THESE CASES RECOGNIZE THAT THE STATEMENT IN COUNSELMAN ON ABSOLUTE IMMUNITY WAS AT BEST A DICTUM ON AN ISSUE WHICH HAS NOT BEEN PRESENTED TO THIS COURT UNTIL NOW.

The issue of the constitutional efficacy of a full use restriction immunity statute, in lieu of the absolute immunity gratuitously offered by Congress in all federal immunity statutes enacted after 1893, remained in limbo for years. It finally was forced to the forefront, unavoidably, as a result of the nationalization of the Fifth Amendment via the "incorporation doctrine" in *Malloy* v. *Hogan,* 378 U.S. 1 (1964). And the issue was resolved in favor of the efficacy of full use restriction immunity, in *Murphy* v. *Waterfront Commission, New York Harbor,* 378 U.S. 52 (1964).

Abstractly viewed, even under a nationalized Fifth Amendment an absolute immunity concept could have been retained (even though the concept is historically unsupportable and generically illogical as already discussed), but only at the price of aborting all related prosecutions not only in the immunizing jurisdiction, but also in all sister jurisdictions. It is true that a federal immunity may be phrased by Congress to override state law enforcement policy and bar subsequent state prosecution for an offense related to the words spoken in the federal investigation. *Adams* v. *Maryland,* 347 U.S. 179 (1954). The justification here, however, is congressional policy and federal supremacy.

It would be startling to assert the proposition that an "immunity bath" process under the absolute type statute of some state, *e.g.,* Nevada, should be allowed to abort a whole range of federal prosecutions for tax, vice, commerce violations, etc., if the prosecutions

relate to the words spoken in the state investigation, or to their fruits. And would it not equally be startling to assert the same proposition regarding Nevada power even in regard to California law enforcement policy?

To avoid such a spectacle the solution as worked out by the Court in *Murphy* v. *Waterfront Commission* is to develop a full use restriction rule as a constitutional requirement under the Fifth Amendment to protect the reluctant witness from adverse impact of his compelled testimony. Where there is no immunity statute but compulsion occurs, this "rule in *Murphy's* case" operates as an exclusionary rule judicially imposed under the Fifth Amendment. And the same rule should mark the limits of protection owed to the reluctant witness when law enforcement needs make it necessary to resort to immunity statute procedure.

The precise holding in *Murphy,* which arose out of an interstate compact-based state investigation of waterfront corruption, was that as a consequence of the new scope of the Fifth Amendment announced in *Malloy* v. *Hogan,* the federal government must be barred from prosecutorial use of the state-compelled "testimony and its fruits." Although in *Murphy* there was a state immunity statute which by its terms purported to extend immunity concerning "any criminal proceeding," the Court did not rely on it for its holding. (The statute had been enacted before *Malloy* nationalized the Fifth.) Rather, the Court worked out a rule based on the Fifth Amendment itself, interpreted in the context of the needs of the federal system.

Justice Goldberg phrased the holding of the Court as follows:

> . . . we hold the *constitutional rule* to be that a state witness may not be compelled to give testi-

> mony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude moreover, that in order *to implement this constitutional rule* and *accommodate the interest of the State and Federal Governments* in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled *testimony and its fruits.* (378 U.S. at 79.) (Emphasis added.)

Justice Goldberg's footnote for this statement, further explaining his meaning, reads as follows:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence. (*Ibid.*)

Justice White, concurring, made a similar but more explicit statement concerning the scope of the constitutionally required protection in this situation: He said:

> The Constitution does *not* require that immunity go so far as to protect against *all prosecutions* to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on *untainted evidence after a grant of federal immunity* in exchange for testimony in a federal criminal investigation. Likewise it is possible that information gathered by a state government which has an important but wholly separate purpose in conducting the investigation and no interest in any federal prosecution will not in any man-

> ner be used in subsequent federal proceedings, at least "while this court sits" to review invalid convictions. Panhandle Oil Co. v. State of Miss. ex rel. Knox, 277 U.S. 218, at 223, 48 S.Ct. 451, 72 L.Ed. 857 (Holmes, J., dissenting). *It is precisely this possibility of a prosecution based on untainted evidence that we must recognize.* For if it is meaningful to say that the Federal Government may not use compelled testimony to convict a witness of a federal crime, then, of course, the Constitution permits the State to compel such testimony . . . . I believe the State may compel testimony incriminating under federal law, but the Federal Government may not use *such testimony or its fruits* in a federal criminal proceeding. Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination. (378 U.S. at 106-107.) (Emphasis added.)

After this breakthrough in *Murphy,* responsive to the difficulties with absolute immunity in a federal system, and also having the effect of restoring the Fifth Amendment to the realm of rational discussion, developments on use immunity followed rapidly. It was perceived that full use immunity was really the same as the familiar exclusionary rule which has been our constitutional safeguard in the coerced confession line of cases from *Brown* v. *Mississippi,* 297 U.S. 278 (1936) down through *Miranda* v. *Arizona,* 384 U.S. 436 (1966) and on to the present. It is the same rule which has guided search and seizure litigation in federal courts since *Weeks* v. *United States,* 232 U.S. 383 (1914), and in all courts since *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The exclusionary rule also governs the still-developing litigation concerning unauthorized electronic eavesdropping, *Alderman* v. *United States,* 394 U.S. 165 (1969).

The use restriction concept has enabled the Court to make sense out of the delicate balance of individual

and public interest concerning dismissal of public employees who block inquiries into their discharge of their public trust by pleading self-incrimination. A public employee may not be coerced into incriminating himself by threat of discharge if he remains silent, *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), and may not be coerced by threat of discharge into signing a waiver of immunity against subsequent criminal prosecution. *Gardner* v. *Broderick,* 392 U.S. 273 (1968), and *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation,* 392 U.S. 280 (1968). Noncooperative conduct in the face of such inquiries, however, hardly qualifies as a certificate of merit. Hence Justice Fortas in his separate comment on *Garrity,* 385 U.S. at 519, and in his opinion for the Court in *Gardner* and *Uniformed Men* worked out the proposition that a Fifth Amendment pleading public employee who is immunized against incriminating use of his answers may be dismissed. He phrased the constitutional principles as follows, in *Gardner;*

> Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. 392 U.S. at 276.
>
> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *State of New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal. 392 U.S. at 278.

This explicit dictum of the Court in *Gardner* and *Uniformed Men* came to fruition on remand in a ruling

of the Court of Appeals for the Second Circuit supporting public discharges of certain New York City employees. The court said that " 'use immunity' suffices for the discharge of public employees who 'refuse to account for their performance of their public trust.' " *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of the City of New York,* 426 F.2d 619 at 626 (2d Cir. 1970); accord, *Silverio* v. *Municipal Court,* 247 N.E.2d 379, cert. denied, 396 U.S. 878 (1969).

To similar effect on Fifth Amendment theory is the subsequent development and clarification of *Spevack* v. *Klein,* 385 U.S. 511 (1967) in which the Court held that an attorney who was the subject of an ambulance-chasing investigation could not be disbarred for pleading self-incrimination and refusing to testify and produce his financial records. A review of post-*Spevack* cases in New York indicates that the holding is limited to those rare situations where there is *no independent evidence* of misconduct on the part of the licensee, and the licensee has merely refused to answer questions by pleading the Fifth Amendment. In short, there is a use-restriction effect, not exoneration. Franck, "The Myth of *Spevack* v. *Klein,*" 54 A.B.J.A. 970 (1968). Nothing here supports the argument that absolute immunity, rather than full use restriction, is needed to overcome a claim of the Fifth.

To be sure, because the landmark *Murphy* ruling came in a case which was technically not an immunity statute case as handled, the Court has on occasion noted that the ultimate meaning of *Counselman* v. *Hitchcock* may still be open. But these comments really express little more than a decent respect for the principles of standing, and ratio decidendi. For example in *Stevens*

Marks, 383 U.S. 234 (1966) which was a narrow case concerning only capacity to withdraw a "waiver" of the Fifth Amendment and immunity, the Court said it was not reaching the distinction between full use immunity and absolute immunity.

However, in the same term of the Court in *United States* v. *Blue,* 384 U.S. 251 (1966), the Court said that if the government had acquired evidence in violation of the Fifth Amendment, the remedy would be to suppress the evidence and its fruits, not to dismiss the indictment as requested by Blue. The opinion of Justice Harlan for a unanimous Court contains this comment: "So drastic a step [barring prosecution altogether] might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." 384 U.S. at 255.) See also on testimonial use restriction in an analogous search and seizure situation *Simmons* v. *United States,* 390 U.S. 377 (1968). The only recent repetition of the *Counselman* dictum came before *Stevens* and *Blue* in a case in which the distinction between full use immunity and absolute immunity was not in issue, or discussed. In *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), the Court struck down a patently insufficient immunity statute of the limited use variety, and it is clear that its holding was that an immunity provision which does not bar fruits too is unconstitutional.

Even more significantly, the 1968 "Bookie Tax" and Gun Registration cases virtually approve sub silentio the principle that an exclusionary rule in the form of a full use restriction immunity statute is adequate to preserve the interest safeguarded by the Fifth Amend-

ment. *Marchetti* v. *United States,* 390 U.S. 39 (1968), *Grosso* v. *United States,* 390 U.S. 62 (1968), *Haynes* v. *United States,* 390 U.S. 85 (1968). The Government urged the Court to save the registration requirements at issue by judicially imposing a use-restriction, as in *Murphy.* The Court said the suggestion was "in principle an attractive and apparently practical resolution of the difficult problem before us." *Grosso, supra,* at 60. However, the Court rejected the suggestion on statutory interpretation grounds, noting the clear intent of Congress that gambler registration information be made available to state and federal prosecutors. The Court was willing to adopt use restriction, but could not do so because the statute itself actually encouraged promulgation of the incriminatory information.

The use restriction dictum in these cases came to fruition in *United States* v. *Freed,* 91 S.Ct. 1112 (1971), when the Court sustained the redrafted firearms registration statute. Under the new act the registration is accomplished by the transferor, but he must provide the photograph and fingerprints of the transferee. However, the information filed is not to be disclosed to any law enforcement agency; *and* there is an immunity provision barring use of the information or its fruits against a registrant or applicant to prove offenses prior to or concurrent with registration. Justice Douglas for the Court said that the nondisclosure provision, "combined with the protection against use . . . satisfies the Fifth Amendment." 91 S.Ct. at 1117. He did append a cryptic footnote purporting not to reach the question of full use immunity as opposed to absolute ("transactional") immunity because under the act "the hazards of self-incrimination are not real." Registration, however, could be accom-

plished by deception, and administrative nondisclosure provisions can be a leaky sieve. The crucial reason the hazard is "not real" is the existence of the *full* use immunity provision, which plugs the leak even if there be one. It is difficult to believe the Court would have upheld the new firearm registration law without the immunity provision.

That the immunity provision was crucial is indicated by Justice Brennan's concurring opinion. He doubted that there was much possibility of federal self-incrimination, provided the registration was "effective," but did see a possibility of self-incrimination under California's law outlawing possession of hand grenades. As to this latter danger he said that the "immunity provision suffices to supplant the constitutional protection." 91 S.Ct. at 1119. His footnote comment at this point saying that absolute ("transactional") immunity was not involved because the self-incrimination danger was under the law of another jurisdiction—which envisions two-levels of immunity statute stringency under one Fifth Amendment—will be dealt with in a separate section, *infra*.

VI. FULL USE IMMUNITY IS CONSISTENT WITH THE DEVELOPED PURPOSES OF THE FIFTH AMENDMENT, AND IS URGENTLY NEEDED FOR EFFECTIVE POLICING OF THE GROWING CATEGORIES OF CRIME CHARACTERIZED BY A WEB OF INTERLOCKING ILLEGAL AGREEMENTS AMONG MANY PEOPLE, SUCH AS "WHITE COLLAR" CRIME AND ORGANIZED CRIME.

A. Immunity and the Policy of the Fifth Amendment

It would extend the brief unduly to embark on an extensive discussion of the various supposed "policy" bases for the privilege, and the purposes it is designed to serve. Virtually all of the major views pro and con on an expansive reading of the privilege are reviewed

and criticized in extenso in Wigmore, and the current writings have recently been collated and evaluated.[27] McCormick, McNaughton, Wigmore and others[28] suggest that the problem of physical coercion of witnesses is now safeguarded by due process, that the problem of political dissent is now safeguarded by the First Amendment, that a whole cluster of clauses in the Bill of Rights safeguard the core of the "accusatorial" method of law enforcement as distinct from the inquisitorial method, and that what is *now* left for the Fifth Amendment—although still very important—is of somewhat smaller compass than the romantic seventeenth century aura which still surrounds it.

To paraphrase a comment made in a similar connection, the present danger is not so much that the values remaining in the Fifth will be subjected to "the erosion of plausible exceptions," [29] as that these values will be expanded by a process of plausible additions to offer gratuities to crime. The essential value inhering in the Fifth Amendment—and it is an elemental and precious value—is that an offender *shall not be forced* by contempt process or other pressure *to help convict himself*, or as the more liberal state constitutions in the last

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[27] 8 Wigmore, *Evidence*, § 2251 (McNaughton rev. 1961); Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 *U. Cin. L. Rev.* 671, 679-95 (1968).

[28] McCormick, "Law of the Future: Evidence," 51 *Nw. U. L. Rev.* 218, 221-22 (1956); McNaughton, "The Privilege Against Self-Incrimination," 51 *J. Crim. L. C. and P. S.* 138 (1960). Wigmore's views are summarized by McNaughton in 8 Wigmore, *Evidence*, § 2251 n. 1 (McNaughton rev. 1961). See also Mayers, *supra* note 3, and Friendly, *supra* note 27.

[29] Book Review of Mayers, *Shall We Amend the Fifth Amendment?*, 9 *J. of Pub. Law* 214, at 220 (1960).

century phrase it—to furnish evidence against himself involuntarily in a criminal matter. See discussion *supra* of *Emery's Case, State* v. *Nowell, Cullen* v. *Commonwealth.*

This value obviously is not well served by a limited use immunity statute, of the sort traditionally employed, and still employed, in England and Canada which does not immunize the fruits of the compelled disclosure. This value is fully served by a full use immunity statute covering both direct and derivative use of the compelled testimony—the kind of statute at issue in *Zicarelli,* and at issue in the cases resting on the new general federal immunity statute enacted in 1970, 18 U.S.C. §§ 6001-6005. *Stewart* v. *United States* and *Kastigar* v. *United States,* 440 F.2d 954 (1971), *cert. granted,* 39 U.S.L.W. 3511 (U.S., May 17, 1971). This value is wastefully served by a process of overkill in the absolute immunity statutes which Congress was induced to enact by the *Counselman* dictum discussed *supra,* which Congress repealed and replaced with full use restriction in 1970. Absolute ("transactional") immunity does not merely safeguard a person from furnishing incriminating evidence against himself. It pardons him wholly for any offense related to his testimony, without any regard for the possible existence of a verifiable case against him based on wholly independent evidence. It is wholly out of line with the exclusionary rules which safeguard all other constitutionally-under-girded evidence principles derived from the common law, *e.g.,* search and seizure and coerced confessions.

As Justice Holmes has said, general propositions do not solve concrete cases. History and logic carry us only so far. The *history* of the self-incrimination privi-

lege points ambiguously either toward limited use immunity (only testimony immunized), which is the English and Canadian practice, or toward full use restriction immunity (testimony and fruits), which was the basis of the more liberal state decisions on which the Court relied in *Counselman.* The *logic* of the Fifth Amendment is *not* satisfied with limited use immunity; it dictates full use immunity, like the current New Jersey statute at issue in *Zicarelli,* and the 1970 federal witness immunity statute, 18 U.S.C. §§ 6001-6005. The logic of the Fifth Amendment is actually offended by an absolute immunity concept: why pardon a person for unknown crimes, or known crimes for which you already have adequate proof? Absolute immunity statutes also pose a problem of moral values, because their effect is to absolve a person of moral culpability without any voluntary "regenerate" act on his part; full use restriction retains our moral values concerning actual or putative legal guilt, even if independent evidence is required for proof.

B. Immunity in the Context of Historical Development and Need

When we move from the general to the particular and place immunity legislation in the context of the modern crime picture, the case for full use restriction immunity becomes overpowering. Ordinary crime, street crime, the conventional common law offenses, are really of little concern to immunity legislation. Conventional law enforcement techniques of patrol and questioning, as augmented by the modern crime laboratory, are our main reliance. It is when we move to multi-party offenses, often conspiratorial in nature and resting on a web of interlocking agreements, that the immunity technique is needed. And these are the very

areas where a wide and casual use of the pardon power (absolute immunity) would be most reprehensible.

The need for immunity statutes has passed through several phases. In the first place the need for them would not be great under any circumstance until the common law privilege against compulsory self-incrimination slowly developed to a relatively high level of sophistication and breadth, and became undergirded with constitutional compulsion. This took a surprisingly long time—not until 1892 for the federal government.

In the second place the need was not great so long as crimes were relatively simple, and regulatory administration had not developed significantly. Many early immunity statutes are found in the context of investigations of official corruption in the liquor business [30] or in legislative bodies.[31] Offenses of this sort are not disclosed by eye witnesses and evidentiary traces such as fingerprints. These offenses are often conspiratorial in nature, operating through a series of illegal understandings among several people, and require an extensive interrogation technique to uncover.

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[30] See, *e.g.*, *Emery's Case*, *supra*, investigation of bribery and corruption in the state police; *State* v. *Nowell*, *supra*, liquor business. Other major categories are found on analysis to involve peripheral use of immunity concepts in civil litigation arising out of usury, insolvency, and judgment debts, where disclosures relevant to the civil suit were protected, for instance, against subsequent use in fraud prosecutions. See Wigmore, *supra*, § 2283 n. 2.

[31] *People* v. *Kelly*, *supra*, acceptance of money by New York City councilmen to influence their votes. As discussed *supra*, the first federal immunity statute, 11 Stat. 155 (1857), was enacted in support of a congressional investigation of alleged sale of legislative favors.

As Justice White phrased it in *Murphy* v. *Waterfront Commission*:

> Such statutes have for more than a century been resorted to for the investigation of many offenses. Chiefly, those whose proof and punishment were otherwise impractical, such as political bribery, extortion, gambling, consumer frauds, liquor violations, and racketeering. 378 U.S. 52 (1964), concurring opinion at p. 94.

Third, as offenses based on interrelated illegal understandings and operations increased markedly with the rise of regulatory administration exemplified by the Interstate Commerce Commission and other federal and state commissions, the need became pinpointed and immunity statutes flowered. On an ad hoc basis immunity provisions were inserted in virtually every major federal regulatory act from 1893 to 1970, at which time Congress replaced the hodgepodge of immunity legislation with an integrated general immunity statute. 18 U.S.C. §§ 6001-6005 (1970).

Fourth, the increasing tendency in vice and related fields for businesses to operate on the edge of the law or outside the law—developing into the colossus we now call organized crime—greatly increased the number of offenses resting on a complex web of illegal understandings. In the area of white collar crime, particularly, violations often are difficult to detect except through interrogation techniques which may induce a plea of the Fifth, and a consequent need to desist or immunize.[32]

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[32] Regarding difficulties in detection and proof of antitrust violations, consumer fraud, and other white collar crimes, and the need for interrogation without risking immunity baths, see Edelhertz (National Institute of Law Enforcement and Criminal Justice), *The Nature, Impact and Prosecution of White-Collar Crime* 35, 39, 42, 69 (1970).

And in that special area of "white collar" crime which we call organized crime, whose influence ranges from an ordered assault which may have been the underlying basis for *Piccirillo* v. *New York,* 400 U.S. 548 (1971) through "polite" society to controlling unions, businesses, public elections and some governments, such techniques as immunity statutes and court-ordered eavesdropping have been shown to be especially effective law enforcement techniques.[33] If organized crime is not curbed nationally, such truly fundamental constitutional values as a fair election, a fair count, and fair representation would become a mockery.

The American Civil Liberties Union, although fundamentally taking a position against any immunity statute, perceived this point in testimony in House hearings on the federal immunity bill in 1970. The A.C.L.U. conceded that there were special problem situations in law enforcement where the immunity technique could be meritorious: "One might decide it is worth it in the area of organized crime where the terroristic methods of the criminal organization or the reluctance of witnesses to give evidence, makes prosecution difficult." Hearings, Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 91st Cong., 1st Sess. Aug. 7, 1969, p. 81.

Fifth, to this category of conspiratorial crimes marked by "terroristic methods," we must now add the offenses of politically motivated violence by some dissident groups determined to bring the "Establishment" to its knees. In theory, if not in accomplished practice,

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[33] Survey story indicating that the new tools of law enforcement have increased prosecutions aimed at gambling operations of organized crime. N. Y. Times, June 7, 1971, p. 26, cols. 3-6.

this development harks back to nineteenth century European anarchism. The continuum action ranges from spasmodic hit and run attacks, bombings, killings of public servants, wanton destruction of property, to organized guerrilla tactics aimed to shut down public facilities. Such actions completely transcend any level of permissible political dissent protected by the First Amendment. This is not the tradition of "Freeborn John" Lilburne.

Such disparate groups as the policeman and the researcher on the college campus may have more to fear from this source than from organized crime. Between January 1, 1969, and April 15, 1970 there were a total of 4,330 explosive and incendiary bombings in the United States. Hearings, Permanent Subcommittee on Investigations, Committee on Government Operations, United States Senate, 91st Cong. Second Sess. Part 24 p. 5341. Since that period, the capitol of the United States has been bombed, and since January of 1969, 51 federal buildings in this country have been bombed, resulting in one death. *Washington Post,* March 11, 1971, p. 3, col. 2. At least 18 policemen nationwide were killed in terroristic attacks in 1970. *Life Magazine* November 13, 1970, p. 36D.

In terroristic crime situations associated with loss of life, whether caused by organized crime or by politically-motivated violence, the prosecutor understandably may hesitate to offer immunity to any witness if the price is an immunity bath, rather than full use restriction. And yet a "rule or ruin" type of crime rooted in an ends justifies the means philosophy requires responsible law enforcement of the most sophisticated sort, including extensive use of the interrogation technique.

There has been some recent concern about what might seem to be an undue extension of powers of investigatory bodies over reluctant witnesses, especially those associated with unpopular causes or extreme political views. However, a mere shift from absolute immunity to full use restriction immunity would not have appreciable impact on the kinds of abuses charged to some investigating committees in the 1950's and early 1960's. There the crucial problem was the legitimacy of the investigation and the relevance of the information sought to any legitimate governmental purpose,[34] and there was no judicial supervision of the sort available in immunity practice. The activities being investigated in the Fifties were unassociated with the kinds of acts of criminal violence which are the target of current investigation. And of course a disposition toward total dissent and noncooperation cannot be overcome either by full use immunity or absolute immunity.

Most law enforcement in both the accusatorial and inquisitorial systems starts with asking a question, the distinction being that in the former system there are restraints on browbeating the *defendant* himself, but *not* a hands-off policy on all witnesses. The more subterranean and complex an offense category becomes, involving multiple understandings among numerous people, the more vital becomes the process of interrogation as a law enforcement technique for social defense.

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[34] See *Watkins* v. *United States*, 354 U.S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Deutch* v. *United States*, 367 U.S. 456 (1961); *Russell* v. *United States*, 369 U.S. 749 (1962); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); see also *Barenblatt* v. *United States*, 360 U.S. 109 (1959) and *Uphaus* v. *Wyman*, 360 U.S. 72 (1959).

VII. IMPLEMENTATION PROBLEMS ARE NOT MORE SERIOUS IN USE IMMUNITY THAN IN ABSOLUTE IMMUNITY; IF ANYTHING, IMPLEMENTATION CONSIDERATIONS POINT TOWARD UTILIZATION OF FULL USE RESTRICTION STATUTES RATHER THAN ABSOLUTE IMMUNITY STATUTES.

A. Practical Problems and Perspectives in Implementing Immunity

Several observations may be made concerning the practicalities of full use restriction immunity, leading up to the larger question of whether it poses undue dangers for the witness.

First, it can be observed that a conversion from absolute immunity to full use restriction immunity will avoid the litigation that occurs under absolute immunity on the issue of "relatedness." To qualify for protection even under absolute immunity a person must show that his subsequent prosecution is related to his prior testimony. Because federal grand juries were not equipped with broad immunity authority until recently, and because immunity grants are relatively rare among administrative agencies, there has been little opportunity for federal litigation on this point. But *Piccirillo* v. *New York*, 400 U.S. 548 (writ of certiorari dismissed, 1971) indicates the difficulties which can arise. As discussed more fully *infra* in Subsection C, the New York court and some members of this Court disagreed on the question whether the witness' testimony on assault and criminal conspiracy was sufficiently related to a bribery indictment handed down by the same grand jury to qualify for immunity. And on this issue the burden of proof rests on the witness.

Further, if the "relatedness" issue in absolute immunity is handled by resolving all doubts in favor of the witness, which would be consistent with the general tendency on other issues touching the Fifth Amend-

ment such as the tendency to incriminate doctrine, other dangers arise. Organized crime figures could then "bathe" in a ban against prosecution for crimes remotely related to their testimony, and for which the government has prior, concurrent, or subsequent independent proof. Such an immunity would seem to be wastefully broader than is required by the spirit of our accusatorial system. By contrast, a use restriction formula can be, and indeed should be, construed broadly in favor of the witness in all doubtful cases, *without* creating the automatic immunity bath which flows from the absolute immunity concept.

Second, more complete and more truthful disclosure may result if full use immunity rather than absolute immunity is employed. Under absolute immunity a witness gets immunity whether he tells the truth or not, so long as he created a "relationship." He thus has little incentive to tell very much, or to tell it truthfully, bearing in mind that proof of perjury is difficult. Under full use immunity, the more he discloses the greater likelihood there is that something he says will provide a basis for arguing later that his testimony provided a lead from which the government could have derived its "independent" testimony. Thus, from the witness' standpoint, the more he says—and it must be truthful to be effective—the heavier he makes the government's burden to show a non-derivative, wholly independent source.

Third, on the negative side it might be argued that full use restriction immunity may discourage testimony because the possibility of a future prosecution still remains. But on analysis this assertion falls apart. The witness will face contempt if he refuses to accept full use immunity. As just noted, the more he says the

more likely is he to make prosecution on an independent evidence theory impossible. The public benefits, and the witness is fully protected. Under these conditions it would not be expected that subsequent prosecutions will occur as a matter of course, but where they do occur (on a showing of independent evidence) they will be especially significant because of the type of crime involved.

Fourth, if absolute immunity were the only way a legislature could constitutionally provide this necessary avenue to obtaining evidence, two further consequences, both disadvantageous to the fair administration of justice would follow, one touching on equal protection values, the other touching on the need to discourage inducements to untruthful testimony. Regarding equal protection, it is of course inherent in the immunity process that the immunized testimony gotten from one offender may be used to build a case against another offender. This is often the only way to "crack" some group crimes. This differential treatment of the two offenders is maximal under an absolute immunity statute because the one immunized obtains a complete pardon while the other may go to jail. Under full use restriction the possibility of conviction under independent testimony remains, and the degree of "inequality" is lessened. Regarding the interest in truthful testimony, under an absolute immunity concept, the prosecution is empowered to offer the maximum inducement—a pardon—for favorable testimony. In some cases such excessive immunity might be expected to produce testimony more helpful to the state than sincerity would permit.

B. Effectiveness of Full Use Restriction Immunity

We come now to what is probably the major issue concerning full use restriction immunity: will it adequately safeguard the witness, or will the difficulties of policing it prove to be so great that the use restriction becomes an illusory promise? The short answer, of course, is to refer to the areas of confessions and search and seizure where the exclusionary rule already is a part of our constitutional system. There is no reason to assume that judicial policing of the exclusionary rule will suddenly fail when it takes the form of a full use restriction immunity statute. In policing the fruit of the poisonous tree doctrine in the area of illegal search and seizure, and illegal electronic eavesdropping, the Court has had long experience in ascertaining what is and what is not "independent" evidence. There has never been a suggestion that the only way to resolve all possible doubts is to grant a pardon for any offenses which may be related to the illegally acquired evidence.

Indeed, the policing of a full use immunity provision will actually be easier than policing the equivalent exclusionary rule in the search and seizure area. There will be a known, overt, pin-pointed point in time when the witness will have made certain easily verifiable disclosures. No evidence obtained *before* that point in time should be excluded, and yet that is precisely the effect of the absolute immunity concept. Nor should any evidence existing *concurrent* or *after* that point in time be excluded either—unless there is taint.

Regarding such concurrent or subsequent evidence, and even the prior-acquired evidence, the government should be and will be under an affirmative constitutional duty of showing that the source is "independent." Thus, it is immaterial whether or not a given immunity

statute itself contains any burden of proof clause, or formula for ascertaining the "independence" of the evidence. Immunity is a response to and a replacement for a constitutional claim of privilege. When an immunity statute takes the form of a full use immunity provision, the burden of proof of "independence" devolves on the Government *automatically*, as a constitutional matter. As Justice Goldberg phrased it, in *Murphy* v. *Waterfront Commission* (writing in special context but giving what we will show should be general rule):

> "... we hold the *constitutional rule* to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him....
>
> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the *burden of showing that its evidence is not tainted* by establishing that it had an independent, legitimate source for the disputed evidence." (Emphasis added.) 378 U.S. at 79 and 79 n. 18.

And as Justice Brennan recently observed in *Mackey* v. *United States*, 91 S.Ct. 1160 (1971), had the Court acceded to the government request and imposed use restriction in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968) (discussed *supra*), a burden of proof rule would have arisen which "would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection

with information obtained as a consequence of the wagering taxes." 91 S.Ct. at 1170, quoting from *Marchetti*, 390 U.S. 39, at 59 (1968). The reason the Court felt precluded from imposing use restriction in *Marchetti-Grosso* was that the statutory intent was an *anti*-use restriction device whereby federal registrants and taxpayers would be exposed to state criminal prosecution. Justice Brennan also alluded in his *Mackey* opinion to the "required records" doctrine which operates in the tax-regulatory fields and observed that "the privilege may not be claimed if the danger of incrimination is only that the information required may show a violation of the taxing or regulatory scheme." *Mackey, supra* 91 S.Ct. at 1168. But what of collateral incrimination under some other law; should that defeat the required records doctrine? The answer should be no, and the solution again should be use restriction.

If, as Justice Brennan also said in *Mackey*, the *Marchetti-Grosso* decision "does not require that, once evidence has actually been compelled, we refuse to protect a valid governmental interest by restricting use of that evidence any more than is required by the Fifth Amendment," 91 S.Ct. at 1170, then it is difficult to perceive, *contra* his own conclusion, why an offer of use restriction should not be adequate to overcome a plea of the privilege at the outset. There is to be sure, as Justice Brennan says, a distinction between a plea of the privilege which is allowed to prevent disclosure, and protecting a person after an involuntary disclosure. But if full use restriction coupled with imposition of a burden of proof on the government (which thus tips the balance against the government in doubtful cases) is adequate in the latter instance, why should it not be adequate to overcome a plea of the privilege and provide informtaion needed by the public?

To the statements of Justice Goldberg for the Court in *Murphy* and Justice Brennan in *Mackey*, recognizing the heavy burden of proof which use restriction imposes on the government, may be added the comments of Justice Harlan in *California* v. *Byers*, 91 S.Ct. 1535, (1971). Commenting on the California Supreme Court's view that the common requirement that accident motorists stop and identify themselves could be juxtaposed with the Fifth Amendment by imposing a "restriction on prosecutorial use of the disclosed information and its fruits," he said:

> "But that accommodation leaves the Government's capacity to utilize self-reporting schemes practically impaired by the *necessary presumption* that evidence used in a prosecution after the individual discloses his relationship to the regulated transaction *would not have been available* if the individual had not complied with the statute. . . .
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> "Even under a use restriction, then, the choice open to the State is to forego prosecution in at least a large number of accident cases involving illegal driving. . . ." (Emphasis added). 91 S.Ct. at 1545.

In short, it is already established that the government bears a heavy burden of showing "independence" of its evidence under a full use restriction rule. It is also quite logically assumed—in the absence of significant empirical proof to the contrary—that full use restriction systems do in practice *"work," i.e.*, they do protect constitutional non-self-incrimination interests and they do hamper or bar prosecution. Indeed, it was the Court's feeling, going beyond the intermediate question of burden of proof, that use restriction would completely hamstring prosecution which led the Court not to impose use restriction in the *Marchetti-Grosso* situa-

tion. The Court said that if use restriction were imposed the Fifth Amendment interest would be protected, but "only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling." *Marchetti* v. *United States, supra* at 59.

In the light of our long experience with exclusionary rules, and sole reliance on them as safeguards for constitutional interest in the fields of confessions and search and seizure, it would be anomalous to maintain that this same device is insufficient to avert self-incrimination when included in an immunity statute. To advert again to *Miranda* v. *Arizona,* 384 U.S. 436 (1966), the rules devised in that case are likewise based on a presumption theory. Proof is difficult regarding the events taking place in the precinct station, where it may be the word of police vs. the word of the suspect. As has been said of immunity situations, most of the evidence is controlled by the government. The Court therefore in *Miranda* created in effect a presumption of police misconduct and of involuntariness of the suspect, unless certain warnings were given. The aim is to avert coerced confessions, not to exclude all confessions.

Similarly in the immunity field—which after all is a very small appendage on the criminal litigation tree by comparison to the vast confessions and search and seizure area—a strong affirmative duty on the part of the government to show independence of the evidence would provide equivalent protection. Prudent governments may also wish to experiment with systems for dating their files, expanded use of affidavits regarding the manner and time of obtaining certain evidence, and the like. Indeed, if deemed advisable after an accumulated experience record, such requirements could be

judicially imposed, as in *Miranda,* as part of the constitution-based presumption-burden of proof system. Perhaps the oldest example of a constitution-based, judicially imposed presumption system is to be found in the racial jury exclusion cases. There the Court has long protected a constitutional interest in an area difficult of proof by creating a presumption of racial discrimination if the percent of minority group on jury panels over a period of years is far smaller than that group's percent of the total area population. *Norris* v. *Alabama,* 294 U.S. 587 (1935); *Swain* v. *Alabama,* 380 U.S. 202 (1965).

It shall also be noted that the burden of proof of "independent source" in the Fifth Amendment-immunity statute situation may on constitutional grounds be made more stringent than obtains in search and seizure situations, in order to adequately protect Fifth Amendment interests. The rationale for the exclusionary rule in the search and seizure cases has been to discourage the police from violating the primary right against illegal search and seizure; it is remedial or derivative, rather than basic. *Mapp* v. *Ohio,* 367 U.S. 643 (1961); Comment, "Scope of Taint under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination," 114 *U. Pa. L. Rev.* 570 (1966). By contrast under the Fifth Amendment the exclusionary principle is not just remedial or deterrent. It is an integral part of the constitutional privilege itself, giving it a primary constitutional basis, as Justice Black noted in *Adams* v. *Maryland,* 347 U.S. 179 at 181 (1954). Hence it is judicially controlled as a primary safeguard inhering in the constitutional value, and can be as stringent as needed to safeguard that value. The Fifth Amendment (or immunity statute) exclusionary

rule therefore would not be limited by *Wong Sun* v. *United States,* 371 U.S. 471 (1963) or other cases which have limited the "spread of the taint" in search and seizure situations by asking not whether the evidence *did* have an independent source, but whether it *could* or *would* have been discovered through independent legal means. Under the Fifth Amendment and a full use restriction immunity principle, it would be appropriate to require proof of actual independent source, not just the possibility of evidence being gotten without the compelled testimony. And of course the Court itself in *Murphy* articulated an unqualified "independent source" test for this Fifth Amendment-immunity statute situation.

C. Immunity in Intrajurisdictional Context

There remains to be disposed of the contention that even if full use restriction be adequate in the context of our federal system when incrimination under the laws of another jurisdiction is at issue, it is not adequate on an intra-jurisdiction basis when self-incrimination is pleaded under the laws of the interrogating jurisdiction itself. It seems to be conceded by some of the justices who oppose full use restriction immunity in the latter context, that it is appropriate in the former context of inter-jurisdictional protection, and that such a rule derived from *Murphy* v. *Waterfront Commission, supra,* is now the law. In *Piccirillo* v. *New York,* 400 U.S. 548 at 567 (1971), Justice Brennan, with Justice Marshall concurring, did not reject all use immunity but said only that " 'use' immunity is insufficient when the government involved is the one that has compelled the incriminating testimony." And in *United States* v. *Freed,* 91 S.Ct. 1112 at 1119 (1971) Justice Brennan said: "No question of transactional

immunity as raised here since the case involves incrimination under the laws of a jurisdiction different from the one compelling the incriminating information."

But on what rational basis can such a distinction be supported? Our modern communication system, personal mobility, and the interjurisdictional web of organized crime and all other types of conspiratorial crime, has given us an integrated national crime problem calling for an integrated response with a premium on interjurisdictional cooperation. In the confessions and search and seizure fields we have no rule that use restriction is adequate interjurisdictionally, but that a full pardon is mandated intrajurisdictionally.

Neither the history nor the logic of the Fifth Amendment, delineated above, mandates such a rule. It must be remembered that the constitutional principle does *not* create a general right of nondisclosure, but a right against involuntary self-incrimination. A plausible showing of possible incrimination must be made before the privilege can be invoked, and the privilege ends when incrimination is removed. The important countervailing principle often lost sight of, phrased long ago in the formative years of the privilege, is that "the public has a right to every man's evidence."[35] The two principles create what has been called "the essential tension that spring from the uncertain mandate" of the Fifth Amendment. *California* v. *Byers*, 91 S.Ct. 1535 at 1549 (1971), Justice Harlan concurring.

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[35] Words of Lord Chancellor Hardwicke, debate in House of Lords, 1742, on Bill for Indemnifying Evidence, 12 *Cobbett's Parliamentary History* 675, 693; quoted in 8 Wigmore, *Evidence* § 2192 (McNaughton rev. 1961).

Further, a rule confining full use restriction immunity statutes to interjurisdictional situations has not been shown to be supported by empirical evidence demonstrating that the practical difficulties of policing use restriction in the immunity field are uniquely different from the difficulties of policing use restriction under other exclusionary rules, *or* that an absolute immunity statute is more easily policed than a use restriction statute, *or* that such difficulties as exist are greater in interjurisdictional situations than in intrajurisdictional situations. Both Justice White and Justice Brennan have hypothesized that the likelihood of a prosecution eventuating is greater when only one government is involved. *Murphy, supra,* at 98; *Piccirillo, supra,* at 561. But such a hypothesis, even if true, does not dictate the choice of one kind of immunity statute over another—a choice which must be made in the light of the totality of constitutional and governmental considerations bearing on the present-day adversary system as discussed in this brief.

As Justice White has observed, "the scope of immunity conferred wholly depends on the testimony given," which is true both of full use restriction statutes and obsolute immunity statutes. *Murphy, supra* at 99. And he went on to analyze the relative difficulties of proof under the two kinds of immunity statutes, speaking at this point in general terms applicable either to the intrajurisdictional or interjurisdictional situation. His view that absolute immunity statutes pose the greater difficulties of proof merits extensive quotation. The argument that only an absolute immunity statute is constitutionally adequate, he observed, logically would void also all of our exclusionary rules concerning an "illegal search and seizure, an il-

legal wiretap, illegal detention, and coercion." He then said:

> Second, there are no real proof problems in this [use restriction] situation. As in the analogous search and seizure and wiretap cases, where the burden of proof is on the Government once the defendant establishes the unlawful search or wiretap . . . once a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the Government can be put to show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence. Since the Government has the relevant information within its control, valid prosecutions need not be sacrificed and infringement on the privilege through use of compelled testimony, direct or indirect, need not be tolerated. It is carrying a premise of perjury and judicial incompetence to excess to believe that this procedure poses any hazards to the rights of an accused.
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> Third, greater requirements or difficulties of proof by a defendant inhere in the rule of absolute immunity. When a witness testifies under the auspices of an immunity act, the immunity he gets does not secure him from indictment or conviction. . . . The witness must plead and prove, as an affirmative defense, that he has received immunity and that the instant prosecution is on account of a matter testified to in exchange for immunity . . . which may pose considerable difficulties where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in an *in camera* administrative proceeding. *Murphy, supra,* at 103-104.

To this line of argument, Justice Brennan in *Piccirillo* v. *New York, supra,* objects that "use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality." 400 U.S. at 567. But this statement misconceives the privilege, unless it is now to be rewritten as a full pardon requirement. Full use immunity does remove the *self*-criminality, and that is all the Fifth Amendment requires.

Justice Brennan also hypothesizes various difficulties in single jurisdiction situations, where men working in the same office may exchange information without keeping adequate records, in ascertaining that evidence has an "independent source." Insofar as such a proof problem may exist, and may possibly be more aggravated in the single jurisdiction situation, it does not follow, as he suggests, that the solution can be found in requiring absolute ("transactional") immunity rather than full use restriction immunity. A better solution would be simply to tighten up on the adverse presumption against the government, as a constitutional rule analogous to the *Miranda* warnings as discussed above.

Even if we were willing to pay the very high price of absolute immunity and indulge in immunity baths, absolute immunity has its own serious proof problems which negate its being a solution to the problem hypothesized. For even under absolute immunity there is the difficult matter of proving "relatedness," as already noted. Immunity flows only from the words spoken and to avert a future prosecution the person must show—with the burden on him rather than on the government—not merely a relationship but a substantial relationship between his compelled testimony

and the subsequent prosecution.[36] For inability to carry this burden federal grand jury witnesses have on occasion failed in their immunity plea in subsequent federal prosecution. *Heike* v. *United States,* 227 U.S. 131 (1914); *Himelfarb* v. *United States,* 175 F. 2d 924 (9th Cir. 1949), *cert. den.,* 338 U.S. 860 (1949).

The difficulty with the "relatedness" test under an absolute immunity statute is well illustrated by *Piccirillo* v. *New York, supra,* itself. There the New York Court of Appeals, and the three members of this Court who addressed the question, Justices Douglas, Brennan, and Marshall, differed on whether a substantial relationship had been demonstrated. A person who had been hired to assault a housing contractor with tire irons was caught by the police, and subsequently tried unsuccessfully to bribe a policeman to dispose of the irons. After pleading guilty and being sentenced for the assault, he was brought before a grand jury which was investigating possible organized crime conspiracies in connection with assault. Under an assurance of immunity he testified freely concerning the assault agreement and the use of tire irons, but the bribery attempt was not mentioned. Four days later the policeman testified about the bribe attempt before the same grand jury, which subsequently indicted the assaulter, Piccirillo, and a codefendant for bribery. Piccirillo's immunity plea on the bribery charge was denied by the New York Court of Appeals on the ground that neither his testimony nor the fruits thereof were used in obtaining the bribery indictment, and that the New York immunity provision did not offer abso-

[36] On the "exchange theory" of immunity statutes of which the "substantial relationship" test is one element, see Dixon, *supra,* 22 *Geo. Wash. L. Rev.* at 479-80, 555 *et seq.*

lute immunity. *People* v. *LaBello and Piccirillo,* 24 N.Y. 2d 598 at 605, 301 N.Y.S. 2d 544 at 550, 249 N.E. 2d 412 at 416. Subsequently in a different case the Court of Appeals reinterpreted the statute as offering absolute immunity, but said the conviction of Piccirillo and his codefendant still was correct because they "gave no testimony which related or pertained to the offense for which they were prosecuted and of which they were convicted." *Gold* v. *Menna,* 25 N.Y. 2d 475 at 482 n. 1, 307 N.Y.S. 2d 33 at 38 n. 1, 255 N.E. 2d 235 at 238 n. 1 (1969).

The "relatedness" issue in *Piccirillo* can be argued two ways. Negatively, it can be argued that the witness did not touch on the bribery in his testimony, and that even his mention of the tire irons did not create a substantial relationship because the state already had its bribery case made out and undoubtedly could have obtained the same indictment from a different grand jury. Such a narrow interpretation would be supported by the "exchange theory" of immunity statutes which underlies *Shapiro* v. *United States,* 335 U.S. 1 (1948), and also by the "harmless error" principle. Affirmatively, and probably more persuasively, it could be argued that there is a substantial relationship because the tire irons were common to the assault and to the bribery attempt, and thus the witness' assault testimony furnished some corroboration for the policeman's bribery testimony. This was the view of Justices Douglas and Brennan in their separate comments in *Piccirillo,* and it is supported by the wording of absolute immunity statutes.

However, do not the very facts of *Piccirillo* argue against absolute immunity statutes with their possible "gratuity to crime," and for full use immunity statutes

as being the appropriate way to safeguard interests in both the intrajurisdiction and interjurisdiction situations? Even under a full use immunity statute it can be argued that the case was wrongly decided and immunity should have been conferred because of the corroboration element, which is a species of "fruit" derived from the witness' testimony. (The tire irons alone should not be enough to create immunity under a use statute because the police had independent knowledge of them, having caught the defendants in the act of assault.) If the state had used separate grand juries the corroboration element would drop out. Under a full use immunity statute conviction would then be possible, and properly so, on an independent evidence theory. Under an absolute immunity statute, however, the government's case would still be forfeited because of the common element of the tire irons. Thus the investigation of a possible organized crime conspiracy, which was why the convicted assaulter was brought before the grand jury, would cause a gratuitous forfeiture of the concurrent bribery offense for which the government had eyewitness testimony.

In summary, the position that full use restriction immunity is all right in some situations arising under the Fifth Amendment, and not in others, is difficult to sustain either in terms of logic, need, or practicalities of enforcement. The position rests on a questionable "two-level" perception of the Fifth Amendment, as follows: (1) full use restriction in the form of a judicially imposed exclusionary rule is always adequate to remove criminality *after* a disclosure compelled in violation of the Fifth Amendment, whether the context is intrajurisdictional or interjurisdictional; (2) a full use restriction immunity statute provision is adequate

before disclosure, as a way of removing criminality, and opening the way to disclosure, where one jurisdiction seeks the testimony and the feared criminality is under the law of another jurisdiction; (3) but a full use restriction immunity provision is inadequate as a way of compelling disclosure where the jurisdiction which seeks the information is the one which might prosecute.

The first point is supported by *United States* v. *Blue*, 384 U.S. 251 (1966), discussed *supra*, and all of the exclusionary rule cases. See also Part III of Justice Brennan's concurring opinion in *Mackey* v. *United States, supra.*[37] The second point flows from *Murphy* v. *Waterfront Commission, supra.* The third point is the issue posed by Justice Brennan in *Piccirillo*, and by the instant appeal, and the Supreme Court has never had occasion squarely to rule on the question. We submit, however, that the contention that there should be a more stringent rule in the third situation is not supportable. It is not supported by history which indicates that beginning with Lilburne the continual demand of proponents of the privilege has been for a full use restriction rule—not a blanket pardon extending even beyond the offense under investigation. Nor is it supported by demonstrable difficulties in implementing the conventional exclusionary rule. As already noted, the burden of proof under a use restriction rule rests

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[37] In the same opinion after discussing *Marchetti-Grosso* Justice Brennan also noted that "if the information has been compelled over a claim of privilege . . . the individual [is to be] protected against the use of that information in state prosecutions under the statutes making criminal the taxed activity, and to complete immunity from prosecution under Federal statutes *of like kind.*" *Mackey*, 91 S. Ct. at 1169. The last three words, to which emphasis has been added, fall short of extending absolute immunity from prosecution under all federal statutes.

on the government, not on the defendant, as under absolute immunity. And as also explained above, the burden of proof in the Fifth Amendment situation may on constitutional grounds be made more stringent than obtains in Fourth Amendment situations.

* * *

We note that the Court of Appeals for the Ninth Circuit, in a case arising under the federal witness immunity act of 1970, 18 U.S.C. Secs. 6001-6005, agrees with the foregoing analysis and conclusion that full use restriction immunity is constitutional in intrajurisdictional context as well as in interjurisdictional context. *Stewart* v. *United States, Kastigar* v. *United States,* 440 F.2d 954 (9th Cir. 1971), *cert. granted,* 39 *U.S.L.W.* 3505 (May 17, 1971). This ruling has been followed by another panel in the same Circuit, *Charleston* v. *United States,* No. 71-1787, and *Herlicy* v. *United States,* No. 71-1788, June 16, 1971. Two opposing opinions rest on the now traditional misconception of the facts actually at issue in *Counselman,* and hence a misconception of the breadth of the *Counselman* holding. *In the Matter of Korman and Likas,* (No. 71-1328) (7th Cir. May 20, 1971); *In the Matter of Kinoy,* (No. M-11-188) (S.D.N.Y. Jan. 29, 1971).

Full use restriction immunity, without reservation regarding the intrajurisdictional context, is also supported by other authorities, *e.g.,* McCormick, McNaughton, Wigmore, and Mayers.[38] And it may also be noted that the new general federal witness immunity act passed in 1970, 18 U.S.C. Secs. 6001-6005

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[38] McCormick, *Handbook of the Law of Evidence,* 285-86 (1954); 8 Wigmore, *Evidence* § 2251 n.1, 2284 (McNaughton rev. 1961); Mayers, *supra* note 3, at 76, 126, 230.

was recommended unanimously by the National Commission on Reform of the Federal Criminal Laws.[89]

VIII. A FULL USE RESTRICTION IMMUNITY FORMULA, UNLIKE AN ABSOLUTE IMMUNITY FORMULA, COULD OPEN THE WAY TO EXTENDING THE IMMUNITY TECHNIQUE TO RELUCTANT WITNESSES CALLED UNDER DEFENDANTS' SIXTH AMENDMENT RIGHT TO HAVE COMPULSORY PROCESS.

Looking to the future, it may be hypothesized that use immunity to overcome a plea of the Fifth Amendment, which we feel has been constitutionalized already for the government in such cases as *Murphy* and *Freed, supra,* could also work to aid criminal defendants regarding their own recalcitrant defense witnesses. In present operation, immunity is limited to witnesses called by the government, *United States* v. *Standard Sanitary Manufacturing Company,* 187 F. 232 (C.C.E.D. Pa. 1911), and yet there may be a similar need regarding witnesses called by the defense. It would be unthinkable to empower defense counsel to confer absolute immunity in such situations. It may be suggested, however, that a full use restriction formula could accommodate the competing considerations of fairness to the defendant and avoidance of large-scale defendant-controlled immunity baths. Indeed, making good on defendant's Sixth Amendment "right of compulsory process for obtaining witnesses

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[89] See Commission's *Final Report* xi (1971) (Edmund G. Brown, Chairman); see also Commission's Second Interim Report *in* Hearings on Measures Relating to Organized Crime, Senate Subcommittee on Criminal Laws and Procedures, 91st Cong., 1st Sess. 287 (1969). The measure was approved by the Senate Judiciary Committee without dissent (Report on Organized Crime Control Act of 1969) and by the House Judiciary Committee with only one dissent (Report on Federal Immunity of Witnesses Act, 1970).

in his favor," *Washington* v. *Texas,* 388 U.S. 14, 23 (1967), may be deemed to require a correlative use immunity provision so that a plea of the Fifth will not vitiate defendant's basic right to have witnesses. In *Earl* v. *United States,* 361 F. 2d 531 (D.C. Cir. 1966), pet. for rhg. en banc, 364 F. 2d 666 (1966), *cert. den.* 388 U.S. 921 (1967), this immunity issue was raised but rejected, the Court saying that "the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power." 361 F. 2d at 534; *accord, Morrison* v. *United States,* 365 F. 2d 521 (D.C. Cir. 1966). However, in a cautionary footnote the court in the *Earl* case also said:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused. Here we are asked in effect to rewrite a statute so as to make available to the accused a procedure which Congress granted only to the Government. (Emphasis in original.) 361 F. 2d at 534 n. 1.

And commenting on the denial of hearing en banc in *Earl* four judges termed the issue "novel and troublesome," and "likely to recur." 364 F. 2d at 667.

CONCLUSION

For the foregoing reasons, New Jersey's full use restriction immunity law is constitutional under the Fifth and Fourteenth Amendments, and the judgment below should be affirmed.

Respectfully submitted,

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